TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~513.~~ ~~267~~ ~~65~~ 11

JOHN GOOD, PLAINTIFF IN ERROR,

vs.

IDA MARTIN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

FILED SEPTEMBER 24, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 513.

JOHN GOOD, PLAINTIFF IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

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1 In the supreme court of Colorado Territory, of the February term, A. D. 1873.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

At a stated term of said supreme court of Colorado Territory, begun and held, according to law, at the city of Denver, in said Territory, on the second Tuesday in February, (it being the eleventh day of said month) A. D. 1873.

Present: Hon. Moses Hallett, chief-justice, and Hon. Ebenezer T. Wells, associate justice; M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court.

At which said term, among others, the following proceedings were had and entered of record in the following-entitled cause, to wit:

JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard, appellant,
vs.
IDA MARTIN, APPELLEE.
} Appeal from district court Arapahoe County.

Be it remembered that, to wit, on the thirteenth day of February, A. D. 1873, there was filed in the office of the clerk of said supreme court of Colorado Territory, a transcript of record, which said transcript of record is in the words and figures following, to wit:

In the district court of the first judicial district of Colorado Territory, in and for said county.

2 TERRITORY OF COLORADO,
County of Arapahoe, ss:

IDA MARTIN
vs.
JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard.

GEORGE H. MILLS, Esq., *Clerk:*

Please certify record containing the process and return, the amended pleadings, the orders of said court at the April term, 1872, thereof, the proceedings of trial at said April term, verdict of jury, judgment, appeal-bond, and bill exceptions.

Resp'y, &c.,

E. L. SMITH,
For Good.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the first judicial district of Colorado Territory, sitting in and for the county of Arapahoe, before the honorable Christian S. Eyster, associate justice of the supreme court of said Territory, assigned to said judicial district, at a term thereof begun and held at the court-house in Denver, in said county, on the
3 second Tuesday (it being the eleventh day) of June, A. D. one thousand eight hundred and sixty-seven.

Present: Honorable Christian S. Eyster, judge of said court; Vincent D. Markham, district attorney of said judicial district; Richard Sopris, sheriff of said county; Henry A. Clough, clerk of said court.

At which said term, among other things, proceedings were had in the following cause, to wit:

IDA MARTIN
vs.
PARKER B. CHEENEY, WILLIAM N. SHEPARD, and John Good. } Trespass on the case, upon promises.

Summons.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

The people of the Territory of Colorado to the sheriff of Arapahoe County, greeting:

We command you that you summon Parker B. Cheeney, William N. Shepard, (drawers,) and John Good, endorser, if they shall be found in your county, personally to be and appear before the district court of said Arapahoe County, on the first day of the next term thereof, to be holden at the court-house in Denver City, in said Arapahoe County, on the second Tuesday of June next, 1867, to answer unto Ida Martin, in a plea of trespass on the case, upon promises, to the damage of said plaintiff, as she say', in the sum of *two* five thousand dollars ($5,000$^{00}_{100}$) *dollars*, and you have then and there this writ with an endorsement thereon in what manner you shall have executed the same.

4

Witness Henry A. Clough, clerk of our said court, and the seal thereof, at Denver aforesaid, this 2d day of April, A. D. 1867.

[SEAL.] HENRY A. CLOUGH, *Clerk.*

(Endorsed on back as follows:)
District court summons. G. docket No. , page . District court. P. B. Cheeney advs. Ida Martin.

TERRITORY OF COLORADO,
Arapahoe County:

APRIL 3*th*, 1867.

I have duly served the within by reading the same to the within-named William N. Shepard, John Good, and P. B. Cheeney this 10 of April, A. D. 1867.

RICHARD SOPRIS, *Sheriff.*

Fees: Service, 4.50; mileage, 1.20; return 75—$4.65.

Filed in the district court this 12th day of April, 1867.
HENRY A. CLOUGH, *Clerk.*

Refiled as amended July 25th, 1870.
OLIVER A. WHITTEMORE, *Clerk.*

Declaration.—(Amended.)

In the district court for the first judicial district of Colorado, sitting in and for the county of Arapahoe *Territory*, to the June term, 1867.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

IDA MARTIN, PLAINTIFF,
vs.
PARKER B. CHEENEY, WILLIAM N. SHEPARD, and John Good, defendants. } Assumpsit. Dam. $2,000.

Amended declaration.

1st count. Ida Martin, plaintiff in this suit, by Geo. W. Perkins, her attorney, complains of Parker B. Cheeney, William N. Shepard, and

John Good, defendants, summoned, &c., in a plea of trespass on the
5 case, on promises. For that whereas the said defendants, Parker B. Cheeney, by his signature as P. B. Cheeney, and William N. Shepard, by his signature as Wm. N. Shepard, and John Good, heretofore, to wit, on the 29th of June, 1866, at Denver City, C. T., and in the county and Territory aforesaid, made their certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, at the banking-house of C. A. Cook & Co., in Denver, C. T., sixty days after date thereof, to Alexander Davidson or order, the sum of eight hundred dollars, for value received, with interest at the rate of five per cent. per month from date until paid, and then and there delivered the said promissory note to the said Alexander Davidson. And the said Alexander Davidson, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at Denver, in the county and Territory aforesaid, indorsed the said promissory note, by which said indorsement he, the said Alexander Davidson, then and there appointed the said sum of money, in the said promissory specified, to be paid to the said plaintiff, and then and there delivered the said promissory note, so indorsed as aforesaid, to the said plaintiff. And the said plaintiff avers that afterwards, and when the said note became due and payable, according to the tenor and effect thereof, to wit, on the 31st day of August, 1866, at the banking-house of C. A. Cook & Co., to wit, at Denver, in the county and Territory aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money was then and there duly required, according
to the tenor and effect of said promissory note, but that
6 neither the said C. A. Cook & Co., nor the said defendants, or either of them, nor any other person or persons, on behalf of the said defendants, did or would at the said time and place when the said promissory note was so presented and shown for payment, as aforesaid, or at any other time or place, before or afterwards, pay the said sum of money therein specified, or any part thereof. And the said plaintiff further saith that, afterwards, to wit, on the 31st day of August, 1866, last aforesaid, at the banking-house of C. A. Cook & Co., at Denver, in the county and the Territory aforesaid, the said C. A. Cook & Co. caused the said promissory note to be duly protested for non-payment thereof. And thereupon, the said plaintiff, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, paid to C. A. Cook & Co. the sum of $15.00 for the costs and charges of said protest attending the non payment of said note, and noting the same. Yet the said defendants, although often requested so to do, wholly neglected and refused to —— the said sum of money, in the said note specified, or any part thereof, or the costs of protest and charges attending the non-payment of said note, and of all which said premises, they, the said defendants, had notice, to wit, on the day and year last aforesaid, at the county aforesaid, by reason whereof, and by force of the statute in such case made and provided, the said defendants then and there became liable to pay to the said plaintiff the said several sums of money when the said defendants should be thereunto afterwards requested. And being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, undertook and then and there faithfully promised the plaintiff to pay

IDA MARTIN
vs.
PARKER B. CHEENEY, WILLIAM N. SHEPARD, and John Good. } Trespass on the case, upon promises.

Summons.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

The people of the Territory of Colorado to the sheriff of Arapahoe County, greeting:

We command you that you summon Parker B. Cheeney, William N. Shepard, (drawers,) and John Good, endorser, if they shall be found in your county, personally to be and appear before the district court of said Arapahoe County, on the first day of the next term thereof, to be holden at the court-house in Denver City, in said Arapahoe County, on the second Tuesday of June next, 1867, to answer unto Ida Martin, in a plea of trespass on the case, upon promises, to the damage of said plaintiff, as she say', in the sum of *two* five thousand dollars ($5,000$^{00}_{100}$) *dollars*, and you have then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness Henry A. Clough, clerk of our said court, and the seal thereof, at Denver aforesaid, this 2d day of April, A. D. 1867.

[SEAL.] HENRY A. CLOUGH,
Clerk.

(Endorsed on back as follows:)
District court summons. G. docket No. , page . District court.
P. B. Cheeney advs. Ida Martin.

TERRITORY OF COLORADO,
Arapahoe County:

APRIL 3*th*, 1867.

I have duly served the within by reading the same to the within-named William N. Shepard, John Good, and P. B. Cheeney this 10 of April, A. D. 1867.

RICHARD SOPRIS, *Sheriff.*

Fees: Service, 4.50; mileage, 1.20; return 75—$4.65.

Filed in the district court this 12th day of April, 1867.
HENRY A. CLOUGH, *Clerk.*

Refiled as amended July 25th, 1870.
OLIVER A. WHITTEMORE, *Clerk.*

Declaration.—(Amended.)

In the district court for the first judicial district of Colorado, sitting in and for the county of Arapahoe *Territory*, to the June term, 1867.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

IDA MARTIN, PLAINTIFF,
vs.
PARKER B. CHEENEY, WILLIAM N. SHEPARD, and John Good, defendants. } Assumpsit. Dam. $2,000.

Amended declaration.

1st count. Ida Martin, plaintiff in this suit, by Geo. W. Perkins, her attorney, complains of Parker B. Cheeney, William N. Shepard, and

John Good, defendants, summoned, &c., in a plea of trespass on the
5 case, on promises. For that whereas the said defendants, Parker B. Cheeney, by his signature as P. B. Cheeney, and William N. Shepard, by his signature as Wm. N. Shepard, and John Good, heretofore, to wit, on the 29th of June, 1866, at Denver City, C. T., and in the county and Territory aforesaid, made their certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay, at the banking-house of C. A. Cook & Co., in Denver, C. T., sixty days after date thereof, to Alexander Davidson or order, the sum of eight hundred dollars, for value received, with interest at the rate of five per cent. per month from date until paid, and then and there delivered the said promissory note to the said Alexander Davidson. And the said Alexander Davidson, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at Denver, in the county and Territory aforesaid, indorsed the said promissory note, by which said indorsement he, the said Alexander Davidson, then and there appointed the said sum of money, in the said promissory specified, to be paid to the said plaintiff, and then and there delivered the said promissory note, so indorsed as aforesaid, to the said plaintiff. And the said plaintiff avers that afterwards, and when the said note became due and payable, according to the tenor and effect thereof, to wit, on the 31st day of August, 1866, at the banking-house of C. A. Cook & Co., to wit, at Denver, in the county and Territory aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money was then and there duly required, according
6 to the tenor and effect of said promissory note, but that neither the said C. A. Cook & Co., nor the said defendants, or either of them, nor any other person or persons, on behalf of the said defendants, did or would at the said time and place when the said promissory note was so presented and shown for payment, as aforesaid, or at any other time or place, before or afterwards, pay the said sum of money therein specified, or any part thereof. And the said plaintiff further saith that, afterwards, to wit, on the 31st day of August, 1866, last aforesaid, at the banking-house of C. A. Cook & Co., at Denver, in the county and the Territory aforesaid, the said C. A. Cook & Co. caused the said promissory note to be duly protested for non-payment thereof. And thereupon, the said plaintiff, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, paid to C. A. Cook & Co. the sum of $15.00 for the costs and charges of said protest attending the non payment of said note, and noting the same. Yet the said defendants, although often requested so to do, wholly neglected and refused to —— the said sum of money, in the said note specified, or any part thereof, or the costs of protest and charges attending the non-payment of said note, and of all which said premises, they, the said defendants, had notice, to wit, on the day and year last aforesaid, at the county aforesaid, by reason whereof, and by force of the statute in such case made and provided, the said defendants then and there became liable to pay to the said plaintiff the said several sums of money when the said defendants should be thereunto afterwards requested. And being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, undertook and then and there faithfully promised the plaintiff to pay

her the said sums of money, when they, the said defendants, should be thereunto afterwards requested.

7 2nd count. And also, for that whereas the said defendants, Parker B. Cheeney and William N. Shepard and John Good, heretofore, to wit, on the 29th of June, 1866, at Denver, C. T., that is to say, at the county and Territory aforesaid, made their certain promissory note in writing, bearing date the day and year aforesaid, which promissory note the said Parker B. Cheeney and William N. Shepard signed with their proper signatures at the bottom, and on the face thereof, and the said John Good, by his proper signature, then and there signed on the back thereof, and which promissory note the said defendants, Parker B. Cheeney and William N. Shepard and John Good, then and there afterwards, to wit, on the day and year aforesaid, delivered to one Alexander Davidson, at the county aforesaid, to wit, on the said 29th day of June, 1866, and thereby, then and there, promised to pay, sixty days after the date thereof, to Alexander Davidson or order, the sum of eight hundred dollars, with interest thereon at the rate of five per cent. per month from date until paid, for value received, at the banking-house of C. A. Cook & Co., in Denver, C. T., and then and there delivered the said promissory note to the said Alexander Davidson. And the said Alexander Davidson, to whom or to whose order the payment of the said sum of money in the said promissory note specified was to be made, after the making of the said promissory note and before the payment of the said sum of money therein specified, to wit, on the day and year last aforesaid, at the county aforesaid, indorsed the said promissory note, by which said indorsement he, the said Alexander Davidson, then and there ordered and appointed the said sum of money in the said promissory note specified to be paid to the plaintiff, and then and

8 there delivered the said promissory note, so indorsed as aforesaid, to the said plaintiff. And the said plaintiff avers that afterwards, to wit, and when the said note became due and payable, according to the tenor and effect thereof, to wit, on the said 31st day of August, 1866, at the banking-house of C. A. Cook & Co., in Denver, C. T., to wit, at the county aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of *of* money therein specified was then and there duly required, according to the tenor and effect of the said promissory note; but that neither the said C. A. Cook & Co., nor the said defendants or either of them, nor any other persons or persons, on behalf of said defendants, did or would, at the said time and place, when the said promissory note was so presented and shown for payment thereof as aforesaid, or at any other time and place, before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do; and, thereupon, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, caused the said promissory note to be duly protested for non-payment thereof; of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice, by means whereof and by force of the statute in such case made and provided, and the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said promissory note specified, and the costs and charges attending the non-payment and the protest of said promissory note aforesaid, when they, the said defendants, should be thereunto

9 afterwards requested; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, undertook, and then and

there faithfully promised the said plaintiff, to pay her the said sums of money when they, the said defendants, should be thereunto afterwards requested.

3d count. And, also, for that whereas the said defendants, Parker B. Cheeney and William N. Shepard, heretofore, to wit, on the 29th day of June, 1866, at Denver, in the county and Territory aforesaid, made their certain promissory note in writing, bearing date the day and year last aforesaid, and then and there promised to pay, at the banking-house of C. A. Cook & Co., in Denver, C. T., sixty days after the date thereof, to Alexander Davidson or order, the sum of eight hundred dollars for value received, with interest thereon at the rate of five per cent. per month from date until paid. And the said John Good, on the day and year aforesaid, at the county aforesaid, did, then and there, at the time of the making of said promissory note, and before the delivery of the same to said Alexander Davidson, sign the same with his own proper signature on the back of said note and as one of the makers thereof; and the said defendants, Parker B. Cheeney, William N. Shepard, and John Good, then and there delivered the said promissory note to the said Alexander Davidson; and the said Davidson, to whom or to whose order the payment of the said sum of money, in the said promissory note specified, was to be made, after the making and delivery to him as aforesaid by said defendants of the said promissory note, and before the payment of said sum of money therein specified, to wit, on the
10 day and year aforesaid, and at the county aforesaid, indorsed the said promissory note, by which said indorsement he, the said Alexander Davidson, then and there appointed the said sum of money in the said promissory note specified to be paid to the plaintiff, and then and there delivered the said promissory note, so indorsed as aforesaid, to the plaintiff, for value received; and the said plaintiff avers that afterwards, and when the said promissory note became due and payable, according to the tenor and effect thereof, to wit, on the 31st day of August, 1866, at the said banking-house of C. A. Cook & Co., in Denver, C. T., to wit, at the county aforesaid, the said promissory note was duly presented and shown for payment thereof, and payment of the said sum of money therein specified was then and there duly required, according to the tenor and effect of the said promissory note; but that neither the the said C. A. Cook & Co., nor the said defendants or either of them, nor any other person or persons, on behalf of said defendants, did or would, at the said time, when the said promissory note was so presented and shown for payment as aforesaid, or at any other time before or afterwards, pay the said sum of money therein specified or any part thereof, but wholly neglected and refused so to do; and, therefore, on the day and year last aforesaid, at the county aforesaid, the said plaintiff then and there caused the said promissory note, then and there remaining due and unpaid, to be duly protested for non-payment; of all which said premises the said defendants afterwards, to wit, on the day and year last aforesaid, had notice, by means whereof and by force of the statute in such case made and provided, the said defendants then and there became liable to pay to the said plaintiff the said sum of
11 money in the said promissory note specified, and the costs of protest, and the costs and charges attending the non-payment of the said sum of money in said promissory note specified, when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay

her the said sum of money, in the said promissory note specified, and the costs of protest, and the costs and charges attending the non-payment and protest, when they, the said defendants, should be thereunto afterwards requested.

Count. And whereas, also, the said defendants heretofore, to wit, on the 29th day of June, in the year of our Lord one thousand eight hundred and sixty-six, at Denver, C. T., to wit, at the county aforesaid, were indebted to the said plaintiff in the sum of two thousand dollars lawful money of the United States, for the work and labor, care and diligence of the said plaintiff before that time done, performed, and bestowed in and about the business of the said defendant, and for the said defendant, and at their special instance and request; and, also, in the further sum of two thousand dollars of like lawful money for divers goods, wares, and merchandise, by the said plaintiff, before that time sold and delivered to the said defendants, and at their special instance and request; and, also, in the further sum of two thousand dollars of like lawful money, for money by the said plaintiff, before that time, lent and advanced to and paid, laid out, and expended for the said defend-
12 ants, and at their like special instance and request; and, also, in the further sum of two thousand dollars of like lawful money, for other money by the said defendants before that time had and received to and for the use of the said plaintiff; and, also, in the further sum of two thousand dollars of like lawful money, for so much money before that time and then due and payable from the said defendants to the said plaintiff for interest upon and for the forbearance and use of divers large sums of money before that time due and owing from the said defendant to the said plaintiff, and by the said plaintiff for'borne to the said defendants for divers long spaces of time before then elapsed, and at the like special instance and request of the said defendants; and, also, that the said defendants accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff, before that time due and owing, and then in arrear and unpaid, and upon such accounting the said defendants was then and there found to be in arrear and indebted to the said plaintiff in the further sum of two thousand dollars of like lawful money, and, being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at, to wit, the county aforesaid, undertook and then faithfully promised the said plaintiff to pay her the said several sums of money in this count mentioned when they, the said defendants, should be thereunto afterwards requested.

Breach. Nevertheless, the said defendants, not regarding their said several promises and undertakings, has not as yet paid the said several sums of money, or any or either of them, or any part thereof,
13 to the said plaintiff, (although often requested so to do,) but the said defendants, to pay the plaintiff the same, have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiff of five thousand dollars; and therefore she brings her suit, &c.

GEO. W. PURKINS,
Attorney for Plaintiff.

Copy of instrument and account sued in said declaration.

$800.] DENVER, C. T., *June 29th*, 1866.

Sixty days after date we, or either of us, promise to pay to Alexander Davidson or order the sum of eight hundred dollars, for value received,

negotiable and payable, without defalcation or discount, at the banking-house of C. A. Cook & Co., in Denver, C. T., with interest at the rate of five per cent. per month from date until paid.

P. B. CHEENEY,
WM. N. SHEPARD.

(Written across the face:) Protested for non-payment Aug. 31st, 1866. Alex. Watkins, notary public.

[50 revenue-stamp.]

(On the back:)

JOHN GOOD.
ALEXANDER DAVIDSON.

Messrs. Cheeney, Shepard and Good, to Ida Martin, Dr.

1866.

29th June.—To money lent, also account		$2,000
Work and labor		2,000
Goods, wares, and merchandise		2,000
Money lent and advanced		2,000
Money had and received		2,000
For interest and forbearance, &c		2,000
On account stated		2,000

14 (Endorsed on back:) 1153. Ida Martin vs. Parker B. Cheeney, et al., assumpsit. Amended nar., &c. Refiled as amended July 25, A. D. 1870. Oliver A. Whittemore, clerk. Filed January 9, 1869. Henry A. Clough, clerk. Geo. W. Purkins, atty. for plff.

Defendants' plea.

In the district court of the first judicial district of Colorado Territory, sitting within and for the county of Arapahoe, of the January term, A. D. 1869.

TERRITORY OF COLORADO,
County of Arapahoe:

IDA MARTIN
vs.
PARKER B. CHEENEY, WILLIAM N. SHEPARD, & John Good. } Assumpsit.

And now comes the said defendant John Good, by Smith & Smith, & John F. Bostwick, his attorneys, and defends the wrong and injury, &c. when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff hath in her said declaration thereof complained against him, and of this he puts himself upon the country, &c.

By SMITH & SMITH, &
J. F. BOSTWICK,
His Attorneys.

And the plaintiff doth the like.

GEO. W. PURKINS,
Plaintiff's Attorney.

(Endorsed on back:) 1153. Ida Martin vs. Parker B. Cheeney, et al. Plea. Filed February 8, 1869. Henry A. Clough, clerk. Smith & Smith, & J. F. Bostwick.

And afterwards, to wit, on the 2d day of April, A. D. 1872, the same being one of the regular days of the April term, A. D. 1872, of said court, then begun and holden at the court-house in Denver, aforesaid, on the first Monday of April, A. D. 1872, before the honorable Ebenezer T. Wells, associate justice of the supreme court of the Territory of Colorado, and assigned to said first judicial district as the judge of the district court thereof, and at which said term there were present the following officers of said court, to wit: Honorable Ebenezer T. Wells, judge of said court; Merrick A. Rogers, district attorney of said judicial district; David J. Cook, sheriff of said county; George H Mills, clerk of said court. The following proceedings were had and entered of record in said cause, to wit:

IDA MARTIN
vs.
PARKER B. CHEENEY ET AL. } Assumpsit.

Now, on this day, comes the said plaintiff, by N. Harrison, esq. her attorney, and moves the court for judgment by default against the defendant John Good. Whereupon comes the defendant John Good, by E. L. Smith, esq., his attorneys, and prays leave of the court to appear and plead herein. And it appearing to the court that the said defendant, John Good, having heretofore plead to issue herein, afterwards, and at the October term, A. D. 1870, of this court, abandoned said issue and withdrew his appearance: Therefore it is considered by the court that the said application of the said defendant be denied, whereupon it is ordered by the court that the default of the defendant John Good be entered of record. And it is thereupon considered by the court that the said plaintiff do have and recover of and from the said defendant John Good her damages, to be assessed, and her costs, to be taxed.

16

And afterwards, to wit, on the 6th day of April, A. D. 1872, the same being one of the regular judicial days of said April term, 1872, of said court, the following further proceedings were had in this cause, to wit:

IDA MARTIN
vs.
PARKER B. CHEENEY ET AL. } Assumpsit.

Now, on this day, comes the said plaintiff, by N. Harrison, esq., and Messrs. Browne and Putnam, her attorneys, and the said defendant' Parker B. Cheeney and William N. Shepard, though each three times solemnly called in open court, come not, but herein wholly make failure and default. Whereupon it is considered by the court that the said plaintiff ought to recover her damages against the said Parker B. Cheeney and William N. Shepard by reason of the premises.

17

And afterwards, to wit, on the 13th day of April, A. D. 1872, the same being one of the regular days of said April term, 1872, of said court, the following further proceedings were had in said cause, to wit:

IDA MARTIN
vs.
PARKER B. CHEENEY ET AL } Assumpsit.

At this day comes the said plaintiff, by Messrs. Samuel E. Browne and N. Harrison, her attorneys, and the said defendant John Good, by E. L. Smith, esq., his attorney, also come. And upon motion of the said

plaintiff, due and sufficient notice thereof having been heretofore given the said defendant, it is considered by the court that the said defendant John Good have leave to elect by the incoming of the court on the morning of Wednesday, April 17th instant, whether he will proceed to the trial of the issues heretofore by him joined herein, or suffer final judgment upon his default heretofore and at this term of the court entered herein.

And afterwards, to wit, on the 18th day of *day of* April, A. D. 1872, the same being one of the regular days of said term of said court, the following further proceedings were had in this cause, to wit:

IDA MARTIN
vs.
PARKER B. CHEENEY ET AL. } Assumpsit.

Now, on this day, comes the said plaintiff, by Messrs. Brown and
18 Putnam and N. Harrison, esq., her attorneys, and thereupon comes the said defendant John Good, by E. L. Smith, esq., his attorney, and in pursuance of the leave heretofore granted by order of this court herein on the 13th instant, says that he will proceed to the trial of the issues heretofore joined herein. And thereupon it is ordered by the court that the default of the said defendant John Good and the interlocutory judgment by the court therein given, and which were entered of record herein on the 6th instant, be and hereby are vacated.

And afterwards, to wit, on the 17th day of May, A. D. 1872, the same being one of the regular days of said April term, A. D. 1872, of said court, the following further proceedings were had in this cause, to wit:

IDA MARTIN
vs.
JOHN GOOD, IMPLEADED WITH PARKER B. CHEENEY AND WILLIAM N. SHEPARD. } Assumpsit.

Now, on this day, comes the said plaintiff, by S. E. Browne, esq., T. G. Putnam, esq., and N. Harrison, esq., her attorneys, and the said defendant John Good, by E. L. Smith, esq., his attorney, also comes. And thereupon comes on to be heard the motion of the said defendant to suppress the whole of the deposition of Alexander W. Atkins taken in this cause upon behalf of the plaintiff; and also the motion of said defendant, certain portions of said deposition, which motions are agreed by counsel. And it appearing to the court that the answer to the 10th interrogatory in the said deposition is irresponsive and wholly immaterial to the issues herein, and contains matter improper to be
19 read to the jury upon the trial of said issue, it is considered by the court that the said answer be suppressed. And it appearing to the court that the residue of the said deposition may be material and relevant to the issue herein, and it further appearing that the said defendant heretore and at the October term, A. D. 1870, interposed his motion herein to suppress the whole of said deposition, with causes thereunder assigned, it is considered by the court that as to the residue of the said deposition the said motions and each thereof is denied. And thereupon comes on to be heard the motion of the said defendant John Good for a continuance of this cause upon the affidavit in that behalf by him herein filed, which is argued by counsel; and the court being

fully advised in the premises, it is considered by the court that the said motion be denied.

And afterwards, to wit, on the 18th day of May, A. D. 1872, the same being one of the regular days of said April term, 1872, of said court, the following further proceedings were had in this cause, to wit:

IDA MARTIN
vs.
JOHN GOOD, IMPLEADED WITH PARKER B. CHEENEY AND WILLIAM N. SHEPARD. } Assumpsit.

Now, on this day, comes the said plaintiff, by S. E. Browne, esq., T. G. Putnam, esq., and N. Harrison, esq., her attorneys, and the said defendant John Good, by E. L. Smith, esq., his attorney, and thereupon comes a jury of twelve good and lawful men, to wit: Louis Aufinger, William McCord, S. G. Gill, J. C. McKee, George Speer, David
20 Mitchell, T. S. Crittenden, M. W. Levy, David Connolly, J. F. Morgan, J. A. Bigler, and W. T. Carter, and they are duly selected, and tried, empanelled, and sworn to well and truly try the issues herein joined between the said plaintiff and the said defendant John Good, and to well and truly asses' the said plaintiff's damages, and a true verdict give according to the evidence; and thereupon came the evidence. After which and the arguments of counsel and the instructions of the court to the jury, the jury retire to their room, in charge of a sworn bailiff, to consider of their verdict. And thereupon, by agreement of the said plaintiff and the said defendant John Good, through their attorneys, it is ordered by the court that the jurors of the said jury, if they shall agree upon a verdict during the recess of the court, before its next incoming, have leave to reduce the same to writing, and after signing and sealing the same and delivering it to the bailiff in charge, to separate to meet the court at its next incoming; and by like agreement it is further ordered that the said verdict, if then informal, may, notwithstanding the separation of the jury, be reduced to proper form.

And upon the same day, to wit, upon the 18th day of May, A. D. 1872, the same being one of the regular days of said term of said court, the following further proceedings were had in said cause, to wit:

IDA MARTIN
vs.
JOHN GOOD, IMPLEADED WITH PARKER B. CHEENEY AND WILLIAM N. SHEPARD. } Assumpsit.

Now, on this day, it appearing to the court that William N. Shepard, who has been regularly subpœnaed to attend this court as a witness on behalf of the said John Good in the above-entitled cause, is
21 absent upon being called, upon motion of the said defendant it is ordered by the court that an attachment for contempt issue for the said William N. Shepard, returnable forthwith; which is accordingly done. And thereupon the said William N. Shepard is brought into court in the custody of the sheriff, and it is demanded of him to purge himself of the contempt alleged against him, and he failing to render to the court *how* any sufficient cause for his absence aforesaid, it is considered by the court that the said William N. Shepard is guilty of a contempt of court. Nevertheless, the said John Good consenting thereto, it is ordered by the court that the costs of this proceeding be taxed against the said Good, and that execution issue therefor in the name of

the people, and that the said William N. Shephard go hence hereof without day.

And afterwards, to wit, on the 20th day of May, A. D. 1872, the same being one of the regular days of said term of said court, the following further proceedings were had in said cause, to wit:

IDA MARTIN
vs.
JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard. } Assumpsit.

Now, on this day, comes the said plaintiff, by S. E. Brown, esq., T. G. Putnam, esq., and N. Harrison, esq., her attorneys, and the said defendant John Good, by E. L. Smith, esq., his attorney, also comes, and the jury, heretofore empanelled and sworn in this cause, having agreed upon a verdict during the recess of the court, and having reduced the same to writing, and after sealing the same, delivered
22 it to the bailiff in charge, in pursuance of the order of the court, made herein on the 18th instant; and the said jury being all present here in court, in the jury-box, the said verdict is opened by the clerk, and being entitled in this cause and signed by the said jurors and each thereof, is in the words and figures as follows, to wit:

We find the issues herein joined between the plaintiff and the said defendant, John Good, for the said plaintiff; and we assess the plaintiff's damages by reason of the non-performing of the promises in th declaration mentioned, as well against the said John Good as against the said Parker B. Cheeney and William N. Shepard, to the sum of three thousand and six hundred and twenty-five dollars and thirty-three cents ($3,625.33); and the said jurors, upon their oaths, do say that the same is their verdict.

And afterwards, to wit, on the 31st day of May, A. D. 1872, the same being one of the regular days of said term of said court, the followin further proceedings were had in this cause, to wit:

IDA MARTIN
vs.
JOHN GOOD IMPLEADED WITH WILLIAM N. Shepard and Parker B. Cheeney. } Assumpsit.

Now, on this day comes the said plaintiff by Samuel E. Browne, esq., T. G. Putnam, esq., and N. Harrison, esq., her attorneys, and the said defendant, John Good, by E. L Smith, esq., his attorney, also comes; and the court having heretofore heard the arguments of counsel upon, and taken under advisement the motion of the said defendant,
23 John Good, for a new trial of this cause, and the court being fully advised in the premises, it is considered by the court that the said motion be denied. Therefore all and singular, the premises being seen and by the court here fully understood, it is considered by the court, that the said plaintiff do have and recover of and from the said defendants, John Good, William N. Shepard, and Parker B. Cheeney, the said sum of three thousand six hundred and twenty-five dollars and thirty-three cents, her damages aforesaid, in form aforesaid assessed, and also her costs by her in and about this said suit in this behalf laid out and expended, and have execution therefor.

And thereupon the said defendant, John Good, prays an appeal from the judgment of the court herein to the supreme court of this Territory,

which is allowed to him on condition that within ten days from this date he file herein a good and sufficient appeal-bond, in the penalty of six thousand ($6,000) dollars, conditioned as required by law, and with sureties to be approved by the clerk of this court; and day, until ninety days from this date, is given the said defendant in which to tender his bill of exceptions to the rulings and judgment of the court in this cause; and it is ordered by the court that when the said bill of exceptions shall be allowed and signed by the judge of this court, the same be filed herein as of this date.

And afterwards, to wit, on the 3d day of June, A. D. 1872, the said defendant, John Good, filed in said court his appeal-bond in this behalf, in words and figures as follows, to wit:

Know all men by these presents, that we, John Good, as prin-
24 cipal, and Henry Feuerstine, as surety, all of the city of Denver, in the county of Arapahoe and Territory of Colorado, are held and firmly bound unto Ida Martin, of the same place, in the penal sum of six thousand dollars, lawful money, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Witness our hands and seals this first day of June, A. D. 1872.

The condition of this obligation is such, that whereas the said Ida Martin, plaintiff, did, on the thirty-first day of May, A. D. 1872, in the district court of the first judicial district of the Territory of Colorado, in and for the county of Arapahoe, at the April term, A. D. 1872, thereof, recover a judgment against the said John Good impleaded with Parker B. Cheeney and William N. Shepard, in an action of assumpsit, for the sum of three thousand six hundred and twenty-five $\frac{33}{100}$ dollars and costs of suit, from which judgment the said John Good has taken an appeal to the supreme court of the Territory of Colorado: Now, if the said bounden John Good shall duly prosecute his said appeal, and shall pay said judgment, costs, interest, and damages in case said judgment shall be affirmed, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN GOOD. [L. S.]
HENRY FEURSTEIN. [L. S.]

(Endorsed on back:) 1153. Ida Martin *vs.* John Good impleaded, &c. Appeal-bond. Approved by me and filed this 3d day of June, A. D., 1872. G. H. Mills, clerk.

25 And afterwards the said defendant, John Good, filed his bill of exceptions in this court in said cause, as of the 31st day of May, A. D. 1872, in words and figures as follows, to wit:

In the district court of the first judicial district of Colorado Territory, in and for the county of Arapahoe. Of the term of April, A. D. 1872.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

IDA MARTIN
vs.
JOHN GOOD IMPLEADED WITH PARKER B. CHEENEY AND WILLIAM N. SHEPHERD. } Bill of exceptions.

Be it remembered, that on the 15th day of May, A. D. 1872, it being one of the days of said term, the said defendant, John Good, filed his motion for a continuance of said cause, as follows:

In the district court of the first judicial district of Colorado Territory, in and for said county. Of the term of April, A. D. 1872.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

IDA MARTIN
vs.
JOHN GOOD ET ALS.

And now comes the said defendant, John Good, by E. L. Smith,
26 his attorney, and moves the court here to continue the above-entitled case to the next term of said court, for reasons stated in the affidavit of said defendant, filed herewith.

By E. L. SMITH,
his Attorney.

And on the same day filed in support of said motion the following affidavit, to wit:

In the district court of the first judicial district of Colorado Territory, in and for said county. Of the term of April, A. D. 1872.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

John Good, a defendant in the above case, being duly sworn according to law, on oath deposes and says: That he cannot safely proceed to trial at the present term of court on account of the absence of one Parker B. Cheney, a material witness on the part of the deponents; that the said Parker B. Cheney is a resident of Golden City, in the county of Jefferson, in the Territory of Colorado; that the deponent expects to prove by the said Cheney that the promissory note upon which the above-entitled suit is founded was drawn in a building situate on Blake street, in the city of Denver, in the county of Arapahoe, and Territory aforesaid, and was, at the same time and place, signed and executed by William N. Shepherd and Parker B. Cheney, as makers; that immediately after the said note was so drawn and executed it was delivered to one Alexander Davidson, who was served as the payee of said note; that the said Davidson then and there received and accepted said note without objection, and without any understanding or stipulation that deponent was to sign said note as a maker thereof; that at the time said note was so drawn and signed and de-
27 livered to the said Davidson, and by him received, the said John Good, the deponent, was not present; and that when the said Davidson received and accepted said note as aforesaid the name of the deponent was not signed thereto or endorsed upon it; that said note was given for money due and owing by the said Shepherd and Cheney, and for no other consideration whatever, and that the deponent was not in any way connected with the consideration thereof, and had no participation whatever therein; that the said Parker B. Cheney, after the said notes had passed into the hands and possession of the said Davidson, the payee therein, was present at the time and place when and where said note was endorsed by the deponent; that the name of the deponent was endorsed thereon in the office of J. Bright Smith, esq., in Lawrence st., between F & E streets, in the said city of Denver, in the presence of the said Parker B. Cheney and George F. Crocker, esqs., and that it was so endorsed by deponent after it had been signed, executed, and delivered to the said Davidson, as hereinbefore mentioned, but whether on the same day when it was so executed and delivered deponent is now unable to say.

Deponent further states that the said George F. Crocker, esq., who was so present when said note was endorsed as aforesaid, some time in the year 1868, suddenly died, before any trial had in the said case, and that deponent has had no opportunity of preserving or perpetuating his testimony, and that he knows of no other person or persons by whom he can prove the above-stated facts than the said Parker B. Cheney.

Deponent further states that on the 2nd day of April, A. D. 1872, he appeared by attorney in said court, and offered to appear and plead to the amended declaration filed in said cause; that the court refused leave to deponent to so appear and plead, and upon the application of the plaintiff by her counsel ordered a judgment of default to be entered
28 against deponent; that afterwards, on the 18th day of said month of April, said judgment was vacated, and deponent allowed to try said cause, and it was set for trial on the 2nd day of May then next ensuing; that before the said 2nd day of May the trial of said cause was, on the request of counsel for the plaintiff, postponed to some future day, to be appointed at a period sufficiently remote to enable the deponent to procure the attendance of his witnesses, whose residence in other counties was known to the counsel for the plaintiff; that on the said 18th day of April, when the cause was ordered by said court to be tried on the said 2nd day of May, deponent caused a subpœna to issue out of the clerk's office of said court commanding the said Parker B. Cheney to be and appear before said court, on the said 2nd day of May, to testify in behalf of the deponent; and also, at his own expense, sent a private messenger to the said Cheney, to insure his attendance, and through said messenger tendered to the said Cheney his fees, mileage, and travelling expenses, to enable him to attend said court pursuant to said subpœna; that said subpœna was duly returned by the sheriff of said county of Jefferson as duly and personally served by reading, on the said Cheney, on the 27th day of April last past, and that after the said trial had, at the request of the said plaintiff by her counsel, been postponed from the said 2nd day of May, as aforesaid, deponent caused the said Cheney to be informed of such postponement; and when, on the 9th day of May, 1872, the trial of said cause was ordered on and for the 18th day of said month of May, deponent immediately caused the said Cheney to be informed thereof, and requested his attendance as a witness on said 18th day of May; that deponent, in answer to said request, received information of the serious illness of the said Parker B. Cheney, and of his inability to attend as such witness on said 18th day of May.

Deponent further states that James Kelly is the family physi-
29 cian of the said Parker B. Cheney, and is and has been in attendance upon him during his said illness; that, during the past week, he has received from the said Kelley two several certificates relative to the condition of the said Cheney, from which it appears, and deponent believes, that the said Cheney is not now, and will not, on the said 18th day of May, be able to attend said court as a witness, as aforesaid, and deponent hereto appends said certificates and makes them part hereof.

Deponent further, on oath, saith that he expects to procure the testimony of the said Cheney at the next term of this court, and that this application for continuance is not made for delay, but that justice may be done.

"JOHN GOOD."

"Sworn and subscribed before me this 15th day of May, A. D. 1873.
"GEORGE H. MILLS, *Clerk.*"

And the following certificate of James Kelley, M. D., made part of the foregoing affidavit, to wit:

TERRITORY OF COLORADO, *Jefferson County.*

I, James Kelley, a practising physician, of the town of Golden, Jefferson County, Colorado Territory, do hereby certify that I am the family physician of P. B. Cheney, and that I have been in attendance upon the said P. B. Cheney for the last three weeks. I further certify that, in the present condition of P. B. Cheney, I consider it unsafe for him to leave home to go to Denver, and that he cannot do so without seriously endangering his health.

Golden, May 1st, A. D. 1872.

JAMES KELLEY."

GOLDEN, COLORADO, *May 14th*, 1872.

I, James Kelley, do hereby certify that I am the attending physician of Parker B. Cheney, and that the said Parker B. Cheney is not
30 able to attend the district court of Arapahoe County, Colorado Territory, on the 18th day of May, A. D. 1872, and, in my opinion, will not be able to attend as a witness in said court under four or five weeks.

JAMES KELLEY, *M. D.*"

And the said motion for a continuance coming on to be heard on the 17th day of May, A. D. 1872, the same being one of the days of said term of said court, and the said affidavit and certificates being read in support of said motion, the court, on consideration of the same, overruled said motion, to which the said defendant, John Good, then and there excepted.

And afterwards, to wit, on the 18th day of May, A. D. 1872, it being one of the days of said term of said court, said cause coming on for trial, on the trial thereof the plaintiff, to maintain the issues on her part, offered in evidence the deposition of Alexander W. Atkins, to which the said defendant, Good, then and there objected for the following reasons:

1st. Because said deposition is irrelevant and incompetent.

2nd. Because parol testimony is not admissible to vary or explain the alleged contract of the defendant, Good.

3rd. Because the deponent, Atkins, refers, in his said deposition, to an exhibit thereto, which exhibit has never been appended or attached to his said deposition.

4th. Because the deponent Atkins' pretended answer to cross-interrogatory No. 11 is not responsive, and because, in his said pretended answer he replies matter as to which he was not asked.

5th. Because the deponent Atkins' pretended answer to cross-interrogatory No. 13 is evasive and not responsive.

6th. Because the deponent Atkins' pretended answer to cross-interrogatory No. 10 is not responsive, and because, in his said pre-
31 tended answer, he replies matter incompetent and as to which he was not and could not be asked.

All of which objections of the defendant, Good, except the 6th and last, were, by the court, then and there overruled, and the whole of said deposition, except the answer to cross-interrogatory No. 10, was received in evidence by the court and was read to the jury, as follows:

Deposition of Alexander W. Atkins.

Interrog. 1st. What is your name, age, occupation, and place of residence?

Answ. 1st. Alexander W. Atkins; age, 39 years; occupation, bookkeeper; and reside in Corinne City, Utah.

Interrog. 2nd. Do you know the parties, plaintiff and defendant in this cause, or either of them, and how long have you known them respectively?

Answ. 2nd. I know the parties and have known all of them for seven years last past.

Quest. 3d. Look at this promissory note now handed to you, marked "Exhibit A," and of which the following is a true copy, to wit:

"$800. DENVER, C. T., *June 29th*, 1866.

"Sixty days after date we, or either of us, promise to pay to Alexander Davidson or order the sum of eight hundred dollars, for value received, negociable and payable without defalcation or discount, at the banking-house of C. A. Cook & Co., in Denver, C. T., with interest at the rate of five per cent. per month from date until paid.

"P. B. CHENEY,
"WM. N. SHEPHERD."

(On back:)

"JOHN GOOD,
"ALEXANDER DAVIDSON,"

and state all you know about its execution and delivery to Alexander Davidson, the payee therein named?

Ans. 3rd. I drew up the note at the office of C. A. Cook & Co., and presented it to P. B. Cheney, Wm. N. Shepherd, and John Good,
32 for execution in a room then known as Cheney's Billiard Hall, on Blake street, in Denver City, C. T. Cheney and Shepherd signed the note at that time. I am not positive whether Good signed or endorsed the note at that time and place or whether he went with me to the office of C. A. Cook & Co., and there signed or endorsed it. It was so signed and endorsed before my delivering the note to Davidson.

Int. 4th. If, in reply to the last interrogatory, you state that the note was signed by the said Cheney, Shepherd, and Good in your presence, then state particularly when the note was so signed.

Ans. 4. The note was signed by Cheney, Shepherd, and Good on the same day it bears date; this is my best recollection.

Intg. 5. If, in reply to any preceding interrogatory, you state that the note was delivered to Alexander Davidson, the payee, by you, then state whose names were on the note when you so delivered it to Davidson, and where Davidson was when he received t.

Ans. 5. The names of P. B. Cheney, Wm N. Shepherd, and John Good were all on the note when I delivered it to Davidson, which was on the day it was so signed by them. Davidson was at C. A. Cook & Co.'s bank when I delivered the note to him.

Intg. 6. Do you know of any matter of thing, in controversy in this cause, that may tend to the advantage of the plaintiff in addition to what you have stated? if yea, state the same as fully and at large as if you had been particularly interrogated thereto.

Ans. 6. The note in controversy was drawn up by me at the request of Alexander Davidson, and was given for a balance of a prior note given to Davidson by Cheney and Shepherd, and signed on the back by

Good, for about thirteen hundred dollars. The difference between
33 the new note and the prior one had been paid the day before the note in controversy was given; and it was understood that the new note was to be executed by the same parties as the old, and in the same manner.

ALEX. W. ATKINS.

Cross-interrogatories in behalf of the defendant, John Good:

1st. Who drew up the note in controversy which is mentioned in direct interrogatories numbers three, four and five? If you say it was drawn up by yourself, then state at whose request, and when and where you drew it up. State particularly the place, building, or room in which it was drawn up.

Ans. 1. I drew up the note in controversy at the request of Alexander Davidson, in the banking-house of C. A. Cook & Co., Denver, on or about the day it bears date.

2nd. What was your employment or business at the time of drawing said note? "Were you at the time of drawing it acting as the agent of Alexander Davidson, the payee in the note," or as the agent of Ida Martin, or of either or both of them?

Ans. 2nd. I was book-keeper in the office, and in the employ of C. A. Cook & Co., then bankers at Denver City, C. T., and was not the agent of either Davidson or Ida Martin.

3rd. If in reply to any direct interrogatory you say you were present at the execution of the note, mention the names of all persons whatsoever, whether parties to the note or not, who were present at its execution.

Ans. 3rd. I was present at the execution of the note; I cannot remember of any persons being present other than Cheney, Shepherd, and Good.

4th. Was not the note first signed and executed by Parker B. Cheney and William N. Shepherd, and then handed to you or to Davidson for the purpose of obtaining the endorsement of the defendant Good?

Ans. 4th. The note was first executed by P. B. Cheney and
34 Wm. N. Shepherd, and at once handed by me to Good for his endorsement. Good at first refused to sign the note, but afterwards signed it, before I delivered it to Davidson.

5th. If you say the note was first signed by Cheney and Shepherd, state to whom the note was handed or delivered after it was so signed by Cheney and Shepherd, and before it was endorsed by Good.

Ans. 5th. I kept the note in my possession until it was signed by all parties, Cheney, Shepherd, and Good.

6th. State, if you know, what the note in controversy was given for. If you say it was given for a balance on another prior note, state the amount for which such prior note was given, and what sum, if any, was paid on such prior note, and by whom.

Ans. 6th. The note in controversy was given for a balance of principal and interest on a prior note. I think the prior note was given for about thirteen or fourteen hundred dollars. I do not remember the amount paid; I think the money was paid by Shepherd.

7th. If you say there was such prior note, and that the note in controversy was given to secure payment of a balance due on such prior note, then state whether such prior note was not given solely for an indebtedness of Parker B. Cheney and William N. Shepherd.

Ans. 7th. There was a prior note, and I think the note in controversy was given to secure payment of balance of prior note.

8th. Did the defendant Good receive the money, or any part of it, for which the note in controversy was given? Was it not given solely to secure the indebtedness of Cheney & Shepherd?

Ans. 8. I do not know that the defendant John Good received any of the money for which the note in controversy was given or not. Note was to secure joint indebtedness of P. B. Cheney, Wm. N. Shepherd, and Jno. Good.

9th. If, in reply to cross-interrogatory No. 6, you say that the
35 note in controversy was given for a balance due on a previous note, and if you are not clear in your recollection of the amount of such previous note, state whether the amount of such prior note was not thirteen hundred dollars, and whether the amount paid on such prior note was not five hundred dollars, and whether such payment was not made solely by William N. Shepherd.

Ans. 9th. The prior note was given for about $13 or $1,400 dollars, and the amount paid was about five hundred dollars. I think Shepherd paid the money, but have no means of knowing out of what funds.

11th. Was not Davidson, the payee in the note in controversy, acting as the agent of Ida Martin, the plaintiff, at the time said note was executed? If you say he was such agent, then state whether you do not know, from information through him or from your own knowledge, that the defendant John Good endorsed the note in controversy, in the office of his (Good's) attorney, in Larimer street, in the city of Denver.

Ans. 11th. At the time of executing the note in controversy, I had no knowledge of Davidson being the agent of Ida Martin, & my recollection is that the note was signed in the office of C. A. Cook & Co.

12th. Were you not a notary public in the city of Denver, Colorado, at the maturity of the note in controversy, and did you not, as such notary public, protest said note against Davidson and Good, the endorsers, for non-payment, after its maturity?

Ans. 12th. I was notary public at the time, and protested the note in the regular order of business.

13th. If, in answer to cross-interrogatory No. 10, you say that Good did not put his name on the back of the note as endorser merely, state why you protested the note against him as an endorser.

Ans. 13th. I protested the note in the usual order of business,
36 and hereunto append the said protest, and make it part of this answer.

14th. If you say you protested the note as mentioned in cross-interrogatory No. 12, state who handed you the note, or how you got it into possession for the purpose of protesting it.

Ans. 14th. The note in controversy was in the hands of C. A. Cook & Co., bankers, for collection, and was protested by me at their request.

15th. If, in answer to any interrogatory, you say you were present at the execution of the note, state whether you mean its execution by Cheney and Shepherd, or whether you include its indorsement by Good.

Ans. 15th. I was present at the execution of the note and saw all the parties sign—that is to say, Cheney, Shepherd, and Good. I include the signing by Good.

ALEX. W. ATKINS."

To which decision of the court in overruling said objections and admitting said deposition in evidence, the said defendant John Good, by his counsel, did then and there except.

And the said plaintiff, further to maintain the issue on her part, gave in evidence and read to the jury a paper marked exhibit B, as follows:

"$800.00.] "DENVER, C. T., *June 29th*, 1866.

"Sixty days after date we, or either of us, promise to pay to Alexander Davidson, or order, the sum of eight hundred dollars for value received, negotiable and payable without defalcation or discount at the banking-house of C. A. Cook & Co., in Denver, C. T., with interest at the rate of five per cent. per month from date until paid."

"P. B. CHENEY.
"WM. N. SHEPHERD."

"(Endorsed:)

"JOHN GOOD,
"ALEXANDER DAVIDSON."

37 TERRITORY OF COLORADO, } *ss:*
County of Arapahoe, }

Be it known, that on the thirty-first day of August, in the year of our Lord eighteen hundred and sixty-six, at the request of C. A. Cook & Co., of Denver, Colorado, I, Alexander W. Atkins, a notary public duly admitted and sworn, dwelling in the city of Denver, county of Arapahoe, and Territory aforesaid, presented the original promissory-note, of which the above is a true copy, at the banking-house of C. A. Cook & Co., and demanded payment thereof, which was refused, whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the makers and endorsers of the said promissory-note, as against all others whom it may or doth concern, for exchange, re-exchange, and all costs, charges, damages, and interest already incurred, and to be incurred, by reason of the non-payment of the said promissory-note; and I, the said notary, do hereby certify that on the same day and year above written, I deposited in the post-office of said city of Denver notice of the foregoing protest, partly written and partly printed, signed by me, and folded in the form of letters, as follows, viz: Notice for —— directed ——, being their respective reputed places of residence and nearest post-offices thereto; and further that on the day and year aforesaid, I served like notices of the foregoing protest as follows, viz: Notice for P. B. Cheney and William N. Shepherd, left at place of business of P. B. Cheney, and resort of Wm. N. Shepherd; for John Good, and Alex. Davidson, delivered to them personally. In witness whereof I have hereunto subscribed my name and affixed my seal of office at Denver, aforesaid, this 31st day of August, A. D., 1866.

In testimoniam veritatis.

ALEXANDER W. ATKINS,
Notary Public."

[Revenue stamp, 25 cents.]

38 And the plaintiff, further to maintain the issue on her part, offered in evidence the following promissory-note and endorsement thereon to wit:

"$800.00.] DENVER, C. T., *June 29th*, 1866.

"Sixty days after date we or either of us promise to pay to Alexander Davidson or order the sum of eight hundred dollars, for value received, negotiable and payable without defalcation or discount, at the banking-house of C. A. Cook & Co., in Denver, C. T., with interest at the rate of five per cent. per month from date until paid.

"P. B. CHENEY,
"WM. N. SHEPHERD."

And the endorsements as follows, to wit:

"JOHN GOOD.
"ALEXANDER DAVIDSON."

To the giving of which note and the said endorsements, in evidence, the defendant, John Good, by his counsel, did then and there object: 1st, generally, and 2d, because the note declared on in the plaintiff's declaration is described and declared on as the note of Parker B. Cheney, William N. Shepherd, and John Good, and the note offered is the note of the said Cheney and Shepherd only; which objections of the said defendant were by the court overruled, and the said note and endorsements were, by the court, admitted in evidence, and were read to the jury; to which decision of the court in overruling said objection and admitting said note and endorsements in evidence, the said defendant, Good, did then and there except.

And the plaintiff, to further maintain the issue on her part, called as a witness, Alexander Davidson, who, being duly sworn, testified as follows, having first had the note heretofore given in evidence handed to him:

"I have seen this note before. It was delivered to me by a Mr.
39 Atkins, who drew it, or by Mr. Cheney or Shepherd—they were all together. The names of Cheney, Shepherd, and John Good were on this piece of paper when it was handed to me. It was delivered to me in the banking-house of C. A. Cook & Co., their office."

And the said witness, on his cross-examination, testified as follows:

"I think I was round there when the note was signed. I was there when one or two of them signed it. Couldn't say which parties I saw sign it. It's a long time since. Couldn't be positive which one signed it first; they were there—two or three together at the counter. Could'nt say whether they all signed it on the same day. It was signed when I took it as security for the money. Can't say I saw all the parties sign the note. Don't think I did. Couldn't say so now. There was two notes. The note was delivered to me, I believe, at Cook & Co.'s old banking-office, on Blake street. I don't know whether Atkins drew the note at their request or mine. I seen parties sign one of the notes, a previous one to that one—elsewhere than at Blake street. To the best of my knowledge, I saw some of the parties sign the note. I think Shepherd and Cheney were both at Cook & Co.'s office, when I saw some person sign the note. I am not certain John Good was there at that time."

The witness was here asked as follows:

"Did you not, after the note was signed by Cheney in the bank, take it up-stairs into the billiard-room, and there get Shepherd to sign it?" To which the witness answered as follows: "I think that was the other note; couldn't say whether he signed this note there, or above. The billiard-room was up-stairs."

The witness was here asked as follows:

"State whether the note, after it was signed by Cheney and Shepherd, was not handed to you by Shepherd in the billiard-room?" To which the witness answered as follows:

"I think it was handed to Atkins up there; he drew the note
40 and was doing the business. The note was given for a balance of a $1,300 note. Shepherd on the day before this note was given had paid $500 on that $1,300 note. I think that $1,300 note was given three months before, perhaps less, or thirty days; can't say whether 3 months or 6 months. I do not recollect taking this note to Shepherd, after it had been signed by Cheney, and asking him to sign it, and of his refusing on the ground that he had just paid his proportion of the $1,300 note."

Witness was here asked as follows: "Did you see Good down there

at the bank, on the day this note was given at all?" To which he answered as follows: "I might and I might not. I think I did see him that day," and the witness continued: "Atkins had the note in custody in the safe. It ain't very likely I kept it even an hour. The hour I had it must have been about the same time. I couldn't say whether I got it on the same day I saw these parties sign it or not."

Witness was here asked the following question: "Did you not swear before that you received it from Atkins on the day it was signed?" To which he answered as follows; "To the best of my recollection, I did say, to the best of my recollection, I received the note on that day," and witness continued, "Couldn't say what time of day this signing was, whether morning or afternoon—it was some time in business-hours anyhow. Atkins wasn't acting as my agent. He was a partner of mine at that time; I think he drew the note."

Witness was here asked the following question: "Whose indebtedness was this eight hundred dollars?" To which question the plaintiff by her counsel objected, on the ground of immateriality, which objection of the plaintiff was sustained by the court and the said question overruled, to which decision of the court in sustaining said objection and overruling said question, the said defendant, Good, by his counsel did
41 then and there except. And the said defendant, John Good, by his counsel here offered to prove that the defendant Good was not connected with the consideration of the note, and had no participation whatever therein; to which offer the plaintiff, by her counsel, objected on the ground of immateriality, which objection was sustained by the court, and the said offer of proof by the said defendant was by the court overruled; to which decision of the court in sustaining said objection, and overruling said offer of proof, the defendant Good did then and there except.

And the said defendant John Good, by his counsel, here offered to prove that the defendant Good's name was put upon the back of the note to give it currency and enable the payee to negotiate it, to which offer the plaintiff, by her counsel, objected on the ground of immateriality, and that it tends to prove the liability of the said defendant Good, which objection was sustained by the court; to which decision of the court in sustaining said objection the defendant Good, by his counsel, did then and there except.

The witness was asked the following question: "Did you not swear in this case, on one of the former trials, that all of the names were put on the note on the 29th of June, the day of its date?" And the witness answered: "On my former time on the stand I think you'll find my answer was that all the names were on it before we gave them the money; I think that was about my answer." And the witness proceeded: "I put my name across the back of the note when I turned it over to Ida Martin; think that was about the day the note bears date. I'm sure I could not tell; think I signed it at Cook & Co.'s bank; think I didn't sign it at same time with other parties; couldn't tell how soon afterwards; presume it was when she came for note; think that
42 wasn't the same day with execution of the note. It lay there in the safe a good while; don't know how long after execution of note it was before she came for it; think maybe it wasn't till it was put in court. Couldn't say she came for the note in a month or in a week after it was executed; I think she didn't come for it the day it was executed; I don't think I put my name on back of note till she came for it, when she was going to sue it."

The witness was here asked the following question: "Did you not

say on your former examination that all these names were on this note on 29th of June?" To which question the plaintiff, by her counsel, objected, because it does not indicate what names the witness was on his former examination asked about; which objection was by the court sustained, and the said question overruled; to which decision of the court, in sustaining said objection and overruling said question, the defendant Good, by his counsel, then and there excepted.

The witness was then asked the following question: "Did you not on a former trial of this case, and when examined as a witness, say that all the names now on the note were put on it on the 29th June?" To which the witness answered as follows: "If I did I didn't include my name. I don't think I gave it to you in that way. I don't know whether I said so or not. I think I ought not to."

The witness was then asked the following question: "Did you not on a former trial of this cause, when examined as a witness, say that you saw all these parties sign this note?" To which he answered as follows: "I said I saw all the parties sign one of the notes. I couldn't say whether it was that one or the other one." And the witness continued as follows: "Atkins ought to have been present when the note
43 was signed. I couldn't say; I think he was there. He had the note in his possession. I am certain about one of these notes; I don't know if this or the other. He drew both the notes."

And the witness was then asked the following question: "Do you not know that after that note was executed by Cheney and Shepherd it was taken to a lawyer's office in Larimer street for the signature of John Good?" To which he answered as follows: "One of the notes was sent up there to be endorsed by Good. Shepherd and Atkins, I think, took it up; couldn't say whether the signatures of Cheney and Sheperd were on it when it was sent up or not. I think they were."

The witness was then asked the following question: "Was the note which was sent up there the note which you have said Shepherd signed in the billiard-room?" To which he answered: "I couldn't say whether it was or not; my recollection is it was this note that was sent up there. I am not certain who took it up, but I think it was Atkins & Shepherd; some of the parties, anyhow. I did not go up. Good's name was on the prior note, I don't know on what part, whether on the face or back of it."

The witness was then asked the following question: "Are you at all certain in the testimony you have given here, as to the signing of the note in Cook's bank, whether you refer to this note or to the previous note?" To which he answered as follows: "It was this note; I never endorsed the other note at all." And witness proceeded: "The prior note I think was executed in Cook's bank, or up stairs in that building."

The witness was then asked the following question: "Was the note which you say was sent to Larimer street for endorsement of Good, sent up there on the day you saw parties sign it in Cook's bank, or on the next day?" To which he answered: "I don't know; couldn't say
44 now what time of day it was. I don't think I took the note up stairs into billiard-room; think Atkins took it up; I was there; I can't say, though, whether that was the note or the former one."

And the witness, being re-examined by the counsel for the plaintiff, testified as follows:

"I am not certain wh ch of these note' came to Larimer street for signature of Good. I am certain that Shepherd, Cheney, and Good's names were on the back of this note before it came to me."

And the plaintiff, further to maintain the issue on her part, called as a witness George H. Mills, who, being duly sworn, testified as follows:

"I have made a calculation of the interest due on this note to this date. It is $3,625\frac{33}{100}$, principal and interest."

And the witness, on his cross-examination, testified as follows:

"My calculation is at the rate of 5 per cent. per month from date of note to this date."

Which was all the evidence given by the plaintiff.

And counsel of the said defendant John Good, to maintain the issue on his part, called as a witness John Good, the said defendant; when the plaintiff, by her counsel, objected to the said Good being sworn as a witness, on the ground that he was a party to the record; which objection of the plaintiff was sustained by the court, and the offer of the said defendant to swear the said Good as a witness was overruled by the court; to which decision of the court, in sustaining the said objection, and refusing leave to the said defendant to swear the said Good as a witness, the said defendant Good, by his counsel, then and there excepted.

45 And the said defendant Good, further to maintain the issue on his part, called as a witness William N. Shepherd, impleaded with the said Good as a party defendant, and heretofore defaulted in said cause; when the said plaintiff objected to the introduction and swearing of the said Shepherd as a witness in this cause, on the ground of his being a party to the record; which objection of the plaintiff was sustained by the court, and the offer of the said Shepherd as a witness by the said defendant Good was overruled; to which decision of the court, in sustaining said objection and overruling said offer, the defendant Good, by his counsel, then and there excepted.

And the said defendant Good, further to maintain the issue on his part, called as a witness J. Bright Smith, who, being duly sworn, testified as follows, having first had placed in his hands the promissory note heretofore given in evidence:

"I am acquainted with the defendant John Good, and the parties to this note. I couldn't identify this as any note I ever saw before. I have seen a note, a similar note, in the same handwriting, that of Alexander W. Atkins. The note I refer to was between the same parties. I saw the note I refer to in my office. It was a note for the same amount. It was signed by Cheney and by Shepherd. It was brought up into our office for the purpose of getting Mr. Good to endorse it. I mean the office occupied by me and Mr. Steck. Mr. Steck was present; don't now remember if Crocker was present or not. Crocker & Whitsitt were occupying the same office. This was about 9 or 10 o'clock in the morning. I say so because it was about the usual time Good came round with his beer-wagon, and he was there with his beer-wagon to deliver beer to the "Tambien" Saloon. Cheney came up there and met him. This is

46 my only means of recollection as to the time. I remember Cheney coming up on sidewalk with Good, who was delivering beer on his wagon. Cheney and Good went up stairs into the office, and I accompanied them, and they manifested to Steck what they wanted done. Steck arose from his seat for a moment, handed the pen he was using in writing to Mr. Good, and Mr. Good sat down in same chair Steck had been occupying, and endorsed a note, and they left."

Which was all the evidence offered by either of said parties.

The defendant John Good then moved the court, upon the evidence aforesaid, to give to the jury the following instructions:

"1st. The court instructs the jury that before there can be any recov-

ery for the plaintiff in this case, they must believe, from the evidence, that the defendant John Good is a maker of the note, the same as Parker B. Cheney and William N. Shepherd, and jointly with them.

"2nd. The jury are instructed that if they believe, from the evidence, the defendant Good, when he put his name on the back of the note, intended to assume any other liability than that of a maker of the note, then he is not liable in this action, and the verdict should be for the defendant.

"3rd. The jury are instructed that the position of the defendant Good's name on the back of the note entitles him prima facie to be regarded as an endorser merely, and the burden of proof is upon the plaintiff to show that he intended to assume the liability of a maker jointly with Cheney & Shepherd.

"4th. The jury are instructed that, in ascertaining the intention and liability of the parties to the note, they have a right and may take into their consideration the position and location of the names of the parties signed upon the face of the note and endorsed on the back, respectively.

47 "5th. The jury are instructed that the intention of the parties to the note is to prevail, and that, that if they believe, from the evidence, that the obligation of Good was intended to be any other than that of joint maker, then it is immaterial whether he affixed his name before or after the delivery of the note to Davidson, and then he is not liab e in this action, and the verdict should be for the defendant.

"6th. The jury are instructed that if the' believe, from the evidence, that the defendant Good put his name on the back of the note to give it currency, and enable the payee to transfer or negotiate it, then he is not liable as a maker, and the verdict should be for the defendant.

"8th. The court instructs the jury that if they believe, from the evidence, that Atkins was a partner or agent of Davidson at the time of the execution of the note by Cheney and Shepherd, and that as such he received and had possession of the said note after it was so executed by Cheney and Shepherd, and before it was endorsed by the defendant Good, then the liability of Good is not that of a maker of the note, and the verdict should be the defendant.

"9th. The jury are instructed that if they believe, from the evidence, that the note in controversy was given for a balance due on a prior note, which prior note had been given to Alexander Davidson by Cheney and Shepherd, and was endorsed by Good, and that it was the understanding of the parties to the note in suit that it should be signed by the same persons who signed the prior note, and in the same manner, this is evidence tending to show that the parties contemplated and intended that Good's name was not to be placed on the face but on the back of the note; and if the jury find that such was the intention

48 of the parties to the note, they are warranted in inferring that the liability of the defendant Good was not intended to be the same as that of the makers of the note, Cheney & Shepherd; and if the jury draw such inference, then, no matter what the true liability of Good is, he is not responsible as a maker, and the verdict must be for the defendant.

"10th. The jury are instructed that, if they believe from the evidence that the note in controversy was protested by Alexander W. Atkins after its maturity for the non-payment thereof, then it is the presumption of law that such protest was made at the request of the holder of the note at the time of such protest; and if the jury further believe from the evidence that it was so protested against the defendant Good as an

endorser, then the fact of such protest is evidence tending to show that the parties to the note intended Good to be, and regarded him only as, an endorser, in which capacity he is not liable in this suit."

Which instructions, and each and every of them, the court refused to give to the jury; to which decision of the court, in refusing to give said instructions, and in refusing to give each and every of them, the defendant Good, by his counsel, then and there excepted.

And the court, at its own instance, and of its own motion, gave to the jury the following instructions, to wit:

"1. The plaintiff has declared against the defendant John Good, as joint maker with Cheney & Shepherd, of the promissory note which is offered in evidence. The burden of showing what the purpose of Good's signature upon the back of the note was, and that it was made under such circumstances as to render him jointly liable with Cheney and Shepherd, is upon the plaintiff.

"2nd. The defendant Good is not jointly liable with Cheney and Shepherd unless the jury believe from the evidence, 1st, that the
49 note offered in evidence was executed, and the signature of Good placed upon the back thereof, in part discharge of a prior indebtedness of Cheney, Shepherd, and Good; or, 2nd, that the signature of Good was placed upon the back of the note before its delivery to the payee therein, and without any statement by Good at the time of his intention in so doing, and under such circumstances as to warrant the inference that he intended to be bound jointly with Cheney and Shepherd.

"3rd. Upon the question whether the note in controversy was given in part payment of the previous debt of Cheney, Shepherd, and Good, there is evidence to show that such prior indebtedness, if any existed, was by virtue of a promissory note subscribed by Cheney & Shepherd and bearing the name of Good on the back thereof; and if the prior indebtedness spoken of by the witnesses consisted only in a promissory note such as here supposed, then the jury will not be warranted in considering such prior note as the debt of Good in such sense as to render him, by reason of his signature upon the back of the note in evidence in the case, liable as joint maker with Cheney & Shepherd.

"4th. Upon the 2nd question the jury are instructed that, if they find from the evidence that John Good wrote his name upon the back of the note sued on before the delivery of said note to the payee, and that he did not then make any statement of his intention in so doing, he is presumed to have done so as the surety of Cheney and Shepherd, and for their accommodation, and to give them credit with the payee, and is liable for the payment thereof in this action; and if that presumption is not rebutted by the evidence in the case, you must find for the plaintiff on the issue joined between her and the said John Good.

50 "5th. It makes no difference whether Good wrote his name on the back of the note at the same time and place at which Cheney and Shepherd subscribed it or not. The jury will consider any conflict in the testimony upon this point only for the purpose of determining the degree of credit due to the several witnesses, and the point of time when the note came to the hands of the payee therein, and whether Good's name was upon it or not.

"6th. It makes no difference whether the defendant participated in the consideration of the note in question or not, or whether he received orders to receive any part of that consideration, provided he put his name upon the back of the note before its delivery to the payee, without making any statement as to his intended liability thereon if he did so.

If he signed the note merely as the surety of Cheney and Shepherd, or either of them, he is as much liable thereon as though he had participated in such consideration.

"7th. If, however, the promissory note in question was given in renewal of a former note signed by Cheney and Shepherd, and with the name of Good upon the back thereof, payable to Davidson, and held by him, and if the understanding of the parties at the time of such renewal was that the new note should be executed by the same parties, and in the same manner as the old one, then the jury will be warranted in inferring that the intention and understanding of all parties at the time of the execution of the new note was that Good's liability upon the new note should be the same as upon the old; and if the jury make this inference, then the jury cannot find that Good intended to be liable as joint maker with Cheney and Shepherd upon the note now in suit, unless they can first ascertain and determine from the evidence that Good's liability upon the original note was that of joint maker with Cheney and Shepherd; and the jury are further instructed that
51 there is no evidence in the case from which the jury can infer that such was Good's liability upon the old note.

"8th. The fact, if it be a fact, that the notary, Atkins, protested the note in question for the non-payment thereof, & gave notice of the non-payment and protest to the defendant John Good, styling him therein as endorser, is not to be taken as concluding the plaintiff, nor even as an admission of plaintiff as to the character in which Good subscribed the note.

"9th. The court instructs the jury that the credibility of all the witnesses in the case is exclusively for them to consider, and that if they believe from the evidence that any witness has sworn wilfully false in regard to a material fact, they may disregard the whole of his testimony.

"10th. If, however, taking into account the manner of the particular witness in testifying, and all other facts and circumstances in evidence which may seem to them to afford a fair inference upon the question, the jury should be of opinion that the false statement, if any, was not made wilfully, but from confusion or want of recollection, or other like reason, then the jury would not be warranted in disregarding the whole of the testimony of the witness by reason of such false statement merely.

"11th. If A and B subscribe a promissory note as makers, payable to C, and the note is found in the hands of C, with the name of D endorsed in blank on the back thereof, nothing appearing as to when D so endorsed it, or whether any part of the consideration of the note went to his benefit, then the law regards D as an endorser merely, and not liable as joint maker with A and B.

If, however, in the case supposed it is shewn that D put his
52 name upon the back of the note before it came to the hands of C, and while it was still in the hands of A or B, this will warrant the inference that his signature was placed upon the back of the note with the intent to become the surety of the maker, and he will then be liable to an action together with A & B, unless this inference is rebutted or overthrown by direct proof that his agreement was not that of surety to the makers, or by proof of facts and circumstances which raise a different inference.

"If in the case supposed the holder of the note sues A, B, & D, and upon trial fails to show that D put his name upon the back of the note before its delivery to him, he may, nevertheless, have verdict and judgment against A & B. The defendants, other than Good, have

submitted to a default, and thereby confessed the plaintiff's action; and the jury, though they should find the issues between the plaintiff and defendant Good for the defendant, must, nevertheless, assess the plaintiff's damages against the said Cheney and Shepherd."

To the giving of which instructions to the jury by the court, except the 9th instruction, and to the giving of each and all thereof except the 9th, the defendant John Good, by his counsel, then and there excepted, and thereupon the said jury gave their verdict against the said defendant John Good.

Whereupon the said defendant Good, by his counsel, filed the following motion for a new trial:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of Colorado Territory, in and for said county. Of the term of April, A. D. 1873.

IDA MARTIN
vs.
JOHN GOOD ET ALS.

53 And now comes the said defendant John Good, by E. L. Smith, his attorney, and moves the court for a new trial herein, for the following reasons:

1st. The verdict is excessive.

2nd. The verdict is against the law and the evidence.

3rd. The verdict is against the weight of the evidence.

4th. The court erred in refusing to allow John Good and William N. Shepherd, or either of them, to testify as witnesses for said defendant.

5th. The court erred in refusing to permit the said defendant to introduce proof that he was in no manner connected with the consideration of the note in controversy.

6th. The court erred in refusing other proper testimony offered for said defendant, and in admitting improper testimony for the plaintiff.

7th. The court erred in refusing to give the instructions prayed for in behalf of said defendant.

8th. The court erred in giving the instructions submitted to the jury by the court of its own motion.

9th. The court erred in taking from the jury the consideration of facts in evidence and of the inferences arising therefrom as to the true intention of the parties to the note and true nature of their contract.

10th. The court erred in disallowing the motion of the said defendant for a continuance of the cause.

11th. And for other good and sufficient reasons.

By E. L. SMITH,
Atty. of Deft. Good.

Which motion was by the court overruled; to which decision of the court, in overruling said motion, the defendant John Good, by his counsel, then and there excepted. And the court thereon gave judg-
54 ment, upon the verdict of said jury, against the defendant John Good; to which the said defendant, by his counsel, then and there excepted. And inasmuch as the matters aforesaid do not appear of record, the counsel for the said defendant John Good presents this bill of ex-

ceptions, and prays that the same may be signed and sealed by the court and made part of the record in said cause; and it is done accordingly.

E. T. WELLS, [L. S.]
Judge, First District.

This bill of exceptions was tendered to me this August 26th, 1872.

E. T. WELLS,
Judge, First District.

Correct.

BROWNE & PUTNAM,
Attys. for Pffs.

(Endorsed:) 1153. Ida Martin vs. John Good et al. Bill of exceptions. Filed May 31, 1872. G. H. Mills, clerk.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, George H. Mills, clerk of the district court of the first judicial district of the Territory of Colorado, and within and for the county of Arapahoe aforesaid, do hereby certify that the above and foregoing is a true transcript of the record of proceedings and judgment had in said court in said cause at the April term of said court for the year 1872; and also—

1st. The summons, and the sheriff's return thereto;
2d. The amended declaration;
55 3d. The plea of the defendant John Good;
4th. The appeal-bond;
5th. The bill of exceptions;

Filed in said court in said cause as the same appear from the records and files of said court in my office; and that the same is made in accordance with the præcipe filed in this behalf, a true copy of which said præcipe is hereto prefixed.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Denver, in said county, this 10th day of February, A. D. 1873.

[SEAL DISTRICT COURT.] GEORGE H. MILLS,
Clerk.

Fees of clerk district: 160 folio, a 20 c., 32.00; cert. & seal, 1.00—$33.00.

(Indorsed:) 93. John Good, impleaded, &c., appellant, vs. Ida Martin, appellee. Transcript from district court, Arapahoe County. Filed February 13, 1873. David Crater, clerk.

56 And upon the same day, to wit, upon the thirteenth day of February, A. D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory—

Present, honorable Moses Hallett, chief-justice; honorable James B. Belford and honorable Ebenezer T. Wells, associate justices; M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court—

The following proceedings were had and entered of record in said cause in said court, to wit:

JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard, appellant,
vs.
IDA MARTIN, APPELLEE.
} No. 93. Appeal from district court, Arapahoe County.

At this day this cause come on to be heard, upon the motion of said appellant, by E. L. Smith, esq., his attorney, for an extension of time

within which to file assignment of errors herein; and the same having been submitted to the consideration of the court, it is ordered that the said appellant have time, and until the incoming of the court on Monday, the seventeenth day of February, A. D. 1873, to file his assignment of errors herein.

And afterwards, to wit, on the fifteenth day of February, A. D. 1873, the same being one of the days of the regular term A. D. 1873 of said supreme court of Colorado Territory—

57 Present, Hon. Moses Hallett, chief-justice; Hon. James B. Belford and Hon. Ebenezer T. Wells, associate justices; M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court—

The following proceedings were had and entered of record in said cause in said court, to wit:

JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard, appellant, *vs.* IDA MARTIN, APPELLEE. } No. 93. Appeal from district court, Arapahoe County.

At this day come the said appellant, by E. L. Smith, esq., his attorney, and on his motion leave is granted by the court for said appellant to file his written assignment of errors herein by the incoming of this court on Monday, the seventeenth day of February next ensuing this day.

And afterwards, to wit, on the seventeenth day of February, A. D. 1873, there was filed in the office of the clerk of said supreme court of Colorado Territory an assignment of errors, which said assignment of errors is in the words and figures following, to wit:

Assignment of errors.

In the supreme court, of the term of February, A. D. 1873.

TERRITORY OF COLORADO, *ss:*

58 JOHN GOOD, IMPLEADED WITH PARKER B. Cheney & William N. Shepherd, plff. in error, *v.* IDA MARTIN, DFT. IN ERROR. } Assignment of errors.

And now comes the said plaintiff in error, by E. L. Smith, his attorney, & says that in the record & proceedings aforesaid there is manifest error, in this:

1. The district court erred in denying the application of Good, the defendant below, to appear & plead to the amended declaration.

2. The district court erred in entering judgment by default in said cause against the said defendant Good.

3. The district court erred in compelling the said defendant Good to elect to try said cause on the plea to the original declaration or suffer final judgment.

4. The court erred in overruling the motion of the said defendant Good for a continuance.

5. The court erred in allowing to be read to the jury so much of the deposition of the witness Atkins as was read.

6. The court erred in allowing the answer to cross-interrogatory No. 11, in the deposition of the said Atkins, to be read to the jury.

7. The court erred in allowing the answer to cross-interrogatory No. 13, in the deposition of the said Atkins, to be read to the jury.

8. The court erred in admitting in evidence the note in controversy.

9. The court erred in refusing to allow the said defendant John Good to be sworn as a witness & testify in his own behalf.

10. The court erred in refusing to allow William N. Shepherd
59 to be sworn as a witness and testify in behalf of the said defendant John Good.

11. The court erred in refusing the offer of evidence in behalf of the defendant Good that the sole consideration of the note was the indebtedness of Parker B. Cheney and William N. Shepherd.

12. The court erred in refusing the offer of evidence in behalf of the defendant Good that he had no connection with or participation in the consideration of the note.

13. The court erred in refusing to allow the witness Davidson to be asked, on his cross-examination, as to his statements & declarations as a witness on a former trial of the same cause, with a view to his contradiction.

14. The court erred in refusing to give instruction No. 1, as prayed for the defendant Good.

15. The court erred in refusing to give instruction No. 2, as prayed for the said defendant.

16. The court erred in refusing to give instruction No. 3, as prayed for the said defendant.

17. The court erred in refusing to give instruction No. 4, as prayed for the said defendant.

18. The court erred in refusing to give instruction No. 5, as prayed for said defendant.

19. The court erred in refusing instruction No. 6, as prayed for said defendant.

20. The court erred in refusing instruction No. 7, as prayed for said defendant.

21. The court erred in refusing instruction No. 8, as prayed for said defendant.

22. The court erred in refusing instruction No. 9, as prayed for said defendant.

23. The court erred in refusing instruction No. 10, as prayed for said defendant.

60 24. The court erred in charging the jury inter alia, as follows: "The defendant Good is not jointly liable with Cheney & Shepherd, unless the jury believe from the evidence, 1st, that the note offered in evidence was executed & the signature of Good placed upon the back thereof in part discharge of a prior indebtedness of Cheney, Shepherd, and Good; or, 2nd, that the signature of Good was placed upon the back of the note before its delivery to the payee therein and without any statement by Good, at the time, of his intention in so doing, & under such circumstances as to warrant the inference that he intended to be bound jointly with Cheney & Shepherd."

25. The court erred in charging the jury inter alia, as follows: "Upon the second question the jury are instructed that, if they find from the evidence that John Good wrote his name on back of the note sued on before the delivery of the said note to the payee, & that he did not then make any statement of his intention in so doing, he is presumed to have done so as the surety of Cheney & Shepherd, & for their accommodation, & to give them credit with the payee, & is liable for the payment thereof in this action, and if this presumption is not rebutted by the evidence in the case, you must find for the plaintiff."

26. The court erred in charging the jury inter alia, as follows: "It makes no difference whether Good wrote his name on the back of the note at the same time and place at which Cheney and Shepherd subscribed it or not."

27. The court erred in charging the jury inter alia, as follows: "It makes no difference whether the defendant participated in the consideration of the note in question, or not, or whether he received any part of that consideration, provided he put his name on the back of the note before its delivery to the payee without making any statement as to his intended liability thereon if he did so. If he signed the note
61 merely as the surety of Cheney Shepherd, or either of them, he is as much liable thereon as though he had participated in such consideration."

28. The court erred in charging the jury inter alia, as follows: "The fact, if it be a fact, that the notary, Atkins, protested the note in question for the non-payment thereof, & gave notice of the non-payment & protest to the defendant John Good, styling him therein as endorser, is not to be taken as concluding the plaintiff, nor even as an admission of plaintiff as to the character in which Good subscribed the note."

29. The court erred in charging the jury inter alia, as follows: "If, however, in the case supposed, it is shown that D. put his name upon the back of the note before it came to the hands of C., and while it was still in the hands of A. or B., this will warrant the inference that his signature was placed upon the back of the note with the intent to become the surety of the maker, & he will then be liable to an action, together with A. & B., unless this inference is rebutted by direct proof that his agreement was not that of surety to the makers, or by proof of facts & circumstances which raise a different inference.

30. The verdict of the jury was manifestly contrary to the evidence.

31. The verdict of the jury was contrary to, & in violation of, the instructions of the court.

32. The court erred in refusing the motion for a new trial.

33. The court erred in entering final judgment.

By reason whereof the said plaintiff in error prays the said judgment may be reversed.

E. L. SMITH,
Atty. for Plff. in Error.

62 (Indorsed:) 93. John Good, impleaded, &c., *vs.* Ida Martin. Assignment of errors. Filed February 17, 1873. David Crater, clerk.

And afterwards, to wit, on the twenty-seventh day of February, A. D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory—

Present, Hon. Moses Hallett, chief-justice; Hon. James B. Belford, and Hon. Ebenezer T. Wells, associate justices; M. A. Shaffenburg, U. S. marshal; and David W. Crater, clerk of said court—

The following proceedings were had and entered of record in said cause in said court, to wit:

JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard, appellant,
vs.
IDA MARTIN, APPELLEE.
} No. 93. Appeal from district court, Arapahoe County.

At this day came the said parties, by their attorneys, E. L. Smith, esq., for said appellant, and Brown & Putnam for said appellee, and, on mo-

tion of said parties, it is ordered by the court that this cause be set for hearing on the seventeenth day of March next ensuing this day.

And afterwards, to wit, on the seventeenth day of March, A. D. 1873, the same being one of the days of the regular term, A. D. 1873,
63 of said supreme court of Colorado Territory;

Present, Hon. Moses Hallett, chief-justice, and Hon. Ebenezer T. Wells, associate justice; M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court;

The following proceedings were had and entered of record in said cause in said court, to wit:

JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard, appellants,
vs.
IDA MARTIN, APPELLEE.
} No. 93.—Appeal from district court, Arapahoe County.

At this day come the said parties by their attorneys, and it is ordered by the court that the hearing of this cause be postponed until the twenty-second day of March next ensuing this day.

And afterwards, to wit, on the twenty-second day of March, A. D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory;

Present, Hon. Moses Hallett, chief-justice; Hon. James B. Belford and Hon. Ebenezer T. Wells, associate justices; M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court;

The following proceedings were had and entered of record in said cause in said court, to wit:

64

JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard, appellants,
vs.
IDA MARTIN, APPELLEE.
} No. 93.—Appeal from district court, Arapahoe County.

At this day come the said parties by their attorneys, E. L. Smith, esq., for said appellant, and N. Harrison, esq., for said appellee, and this cause came on for further hearing; and the same is argued by counsel and submitted to the consideration and judgment of the court, and judgment thereon is reserved until another day.

And afterwards, to wit, on the thirteenth day of September, A. D. 1873, the same being one of the days of the regular term, A. D. 1873, of said supreme court of Colorado Territory;

Present, Hon. Moses Hallett, chief-justice; and Hon. Ebenezer T. Wells, associate justice; M. A. Shaffenburg, U. S. marshal, and David W. Crater, clerk of said court;

The following proceedings were had and entered of record in said cause in said court, to wit:

JOHN GOOD, IMPLEADED WITH PARKER B. Cheeney and William N. Shepard, appellants,
vs.
IDA MARTIN, APPELLEE.
} No. 93, term, 1873.—Appeal from district court, Arapahoe County.

65 At this day come the said parties by their attorneys, and this cause having been heretofore argued by counsel and submitted to the consideration and judgment of the court at the present term thereof, and it appearing to the court that in the record and proceedings, and in

the judgment of the said district court, in this cause, there is no error; therefore it is ordered by the court that the judgment of the said district court of Arapahoe County in this cause be, and the same is hereby, in all things affirmed and stand in full force and effect; that the opinion of the court filed herein be recorded, and that the said appellee recover of and from the said appellant her costs and charges in this behalf expended, and that she have execution therefor.

And upon the same day, to wit, the thirteenth day of September, A. D. 1873, there was filed in the office of the clerk of said supreme court of Colorado Territory the opinion of the court, which said opinion is in the words and figures following, to wit:

Opinion.

66 Supreme court, February term, 1873.

JOHN GOOD, IMPLEADED WITH PARKER B. Cheney & Wm. N. Shepherd, *vs.* IDA MARTIN. } Appeal from district court, Arapahoe County.

HALLETT, C. J.:

On a former appeal we considered the facts presented in this case with reference to the rule announced in Rey v. Simpson, 22 How., 341, as to the liability of one who becomes a party to negotiable paper by endorsing it in blank before it has passed from the hands of the maker. (1 Colorado, 165.)

It is now urged that we have gone beyond the authority of the principal case in saying that, in the absence of evidence to show the intention of the parties, the endorser may be charged upon such an endorsement as a maker of the note jointly with the parties whose names appear upon the face of the instrument.

In Rey vs. Simpson it is true that it was alleged in the declaration that the endorsement was made for the purpose of guarantying the payment of the note and of becoming surety to the payer for the same, and this was admitted by the demurrer; but if this statement had been omitted from the declaration, it is believed that the principle would be the same; without such an averment the case would stand upon the allegation that the endorsement was made while the note was in the hands of the maker, and before delivery to the payee; and with nothing to show what was the purpose of the endorsement, excepting the
67 mere fact that the party had written his name upon the back of the note, that purpose must be made out. The case then presented is of one who has not received any portion of the consideration of the note, and who, by his signature, has manifested a disposition to become a party to it, but has not declared, except by his signature, in what character he will be bound. In such case it is necessary that the law should declare the intention with which the signature was affixed, for if this were left to the jury there could be no certain rule governing his ability. One jury might find that he was not liable as maker, and another that he was not liable as guarantor, and a third that he was not liable as endorser, and thus, by successive juries, he would be absolved from all liability. If, then, the law is to supply the purpose and intention with which the endorsement was made, it can only be said that it was for the credit and accommodation of the maker of the note,

and this for the reason that there is as yet no other party to the instrument. The payee not having received the note, it cannot be claimed that the endorsement is for his accommodation, and there is, in fact, no one but the maker who can receive any benefit from it.

According to the practice in Minnesota, from whence Rey vs. Simpson was removed, the purpose of the endorsement was properly set forth in the declaration, but such an allegation would find no place in a common-law pleading. The evidence to support the allegation upon issue of fact joined is said to be the circumstances under which the signature was placed upon the back of the note. If this evidence goes no further than to show that the signature was put upon the note in the hands of the maker, I cannot doubt the sufficiency of it. The law will then
68 impute to the endorser a purpose to accommodate and give credit to the maker, because this is the most reasonable interpretation of his act. In common-law pleadings, as before stated, the intention is not alleged, but it is quite as much in issue, and the same effect will be given to the evidence of the circumstance under which the endorsement was made. Whether the pleadings be in one form or another, the object is to ascertain the intention of the party in signing his name, and if there is no distinct expression of intention the law must interpret the act for the purpose of ascertaining it. I conceive, therefore, that the views expressed upon this point on the first appeal may be maintained upon the principle recognized in Rey vs. Simpson, and the charge of the court to the jury enforcing those views is entirely correct.

It was not claimed upon the trial or in the charge to the jury that appellant participated in the consideration of the note, and it seems to have been conceded that he did not. If appellant's liability had been put upon the ground that he shared in the consideration, evidence to disprove the fact must have been received from him; but this is not the theory upon which the case was tried. The fact which he offered to prove was not in issue, and, in the view which was taken of the case, did not affect his liability; he was to be charged as a surety, if at all, and the offer was to show that he was not a principal. The argument is that non-participation in the consideration is a circumstance from which the jury might judge of appellant's liability, and so it is as to the question whether he is principal or surety. But whether he is to be charged as maker, endorser, or guarantor of the note, that circumstance will not explain, and, therefore, it was rightly rejected.

It appears by the evidence that the note in suit was given in
69 renewal of another note executed by the same parties, and in the same manner as this one, in pursuance of an agreement to that effect. Upon this state of facts, the charge of the court that appellant's liability upon the old note would measure his liability upon the new one was based, and upon that point it was entirely correct. This was, however, followed by the further statement that there was no evidence in the case from which the jury could infer that appellant's liability upon the old note was that of a joint maker, a proposition which was not accepted by the jury. The testimony is that the new note was to be executed by the same parties and in the same manner as the old one, and so far as we can learn this was done.

If the parties pursued the same course in making the new note which had been adopted in making the old one, the jury, being informed as to one, were equally well informed as to the other. The new note was found to have been executed in a manner to charge appellant as maker, and if the old note was executed in the same manner, his liability upon that was of the same character. The charge of the court was, therefore, too

favorable to defendant, and the jury have drawn a correct conclusion from the evidence in opposition to it. The evidence upon this point is entirely harmonious, and the misdirection could not have prejudiced appellant upon the trial. Error has not been alleged upon this instruction, but as to the finding of the jury, and these remarks are directed to the point last named. Objection is also made to that portion of the instructions in which the jury were told that appellant might be charged upon evidence that the note was given in part discharge of a previous indebtedness of the three defendants, upon the ground that there is no evidence to which it can be referred. The only evidence of prior
70 indebtedness of the three defendants was the original note of the parties which was taken up at the time the note in suit was given, and this, the jury were informed in the third instruction, was not sufficient to fix upon appellant the liability of maker. Connecting these portions of the charge, they served to inform the jury that the original note was not evidence of prior indebtedness upon which appellant could be bound as maker of the note in suit, and this, if not useful to the jury, was certainly not misleading.

The remaining question to be considered relates to the competency of Shepherd, one of the defendants who had suffered judgment to pass against him, as a witness upon trial of the issue against appellant. As this cause was at issue before the act of 1870, by which the parties in a suit are admitted as witnesses therein, was passed, it is conceded that the provisions of that act cannot control, and the case must be governed by the common-law rule as modified by the act of 1872, which provides that a judgment may be taken against one of several joint defendants in an action upon contract. It is said that the interest of Shepherd in the result of the suit was determined by the default, for by the act of 1872 judgment would go against him, although appellant should succeed upon the issue of fact. It is to be observed that the amount of damages to be assessed against Cheney and Shepherd was to be determined by the jury which tried the issue joined by appellant, and as to that matter Shepherd was certainly not competent to testify. (Bowman vs. Noyes, 12 N. H., 302.) According to some authorities, he was competent to testify to any fact which would go to the discharge of appellant alone, but he was not offered as a witness to prove any such matter. The record states that he was called as a witness further to maintain the issue on the part of appellant, and the plea being
71 the general issue, the question of damages in which Shepherd was directly interested, and most other defences in the action of assumpsit, was provable under it. It is true that the note determined the amount of damages, but for aught that appears the intention may have been to prove payment, or accord and satisfaction, which was admissible under the general issue, and which would diminish the amount to be recovered, from Shepherd himself, as well as the other defendants. Without, however, discussing this view of the question at length, it is sufficient to say that, in the courts of the United States, the parties to a suit were forbidden to testify therein on the ground of public policy, and not because they were interested in the result of the suit. In those courts, according to the old rule, which has recently been changed by statute, a party to the record could not testify, although divested of all interest in the suit. (Bridges v. Armour, 5 How., p. 94.) This is decisive of the question presented, both as to Cheney and Shepherd, and renders any reference to decisions of State courts unnecessary. The points in the assignment of errors number thirty-three, in all of which those only to which I have referred have been mentioned in the argument.

To go through with all of these points and beyond those which counsel have deemed worthy of attention, would be tedious and unprofitable.

The judgment of the district court is affirmed with costs.

Mr. Justice BELFORD did not participate in the determination of this cause.

(Indorsed:) Good v. Martin. Opinion. Filed September 13, 1873. David W. Crater, clerk.

And afterward, to wit, on the fifth day of November, A. D. 1873, there was filed in the office of the clerk of said supreme court of Colorado Territory a writ of error, which said writ of error is hereto attached, and is in the words and figures following, to wit:

Writ of error.

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of Colorado Territory, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between John Good, impleaded with William N. Shepherd and Parker B. Cheney, appellants, and Ida Martin, appellee, a manifest error hath happened, to the great damage of the said John Good, as by his complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may *leave* the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may
73 cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Nathan Clifford, the first in precedence of the associate justices of the said Supreme Court, this twenty-first day of October, in the year of our Lord one thousand eight hundred and seventy-three.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court of the Territory of Colorado.

Allowed:

EBENEZER T. WELLS,
Associate Justice.

(Indorsed:) 93. John Good v. Ida Martin. Writ of error. Filed Nov. 5, 1873. David W. Crater, clerk.

74 And on the day last aforesaid there was filed in the office of the clerk of said supreme court of Colorado Territory a bond, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

JOHN GOOD, IMPLEADED WITH WILLIAM N. Shepherd and Parker B. Cheney,
vs.
IDA MARTIN.

Know all men by these presents, that we, John Good, Alais Koch, and Moritz Sigi, all of the county of Arapahoe, in the Territory of Colorado, are held & firmly bound unto Ida Martin in the sum of seven thousand five hundred & twenty dollars ($7,520,) to be paid to the said Ida Martin, her executors, or administrators; to which payment, well & truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, & administrators firmly by these presents, sealed with our seals & dated this 21st day of October, A. D. one thousand eight hundred and seventy-three. Whereas the above named John Good, impleaded with William N. Shepherd & Parker B. Cheney, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court in & for the Territory of Colorado: Now, therefore, the condition of this obligation is such that if the above-named John Good shall prosecute his said writ of error to effect & answer all damages and costs if he shall fail to make good his plea,
75 then this obligation shall be void; otherwise the same shall be & remain in full force and virtue.

JOHN GOOD. [L. S.]
ALAIS KOCH. [L. S.]
MORITZ SIGI. [L. S.]

Sealed and delivered in presence of—
E. L. SMITH.

(Indorsed:) John Good to Ida Martin. Bond on error to Supreme Court of the United States. Approved. E. T. Wells, associate judge sup. ct. Colorado. Filed November 5th, 1873. David W. Crater, clerk supreme court.

And afterwards, to wit, on the 8th day of November, A. D. 1873, there was filed in the office of the clerk of the supreme court of Colorado Territory a citation, with service thereon, which said citation is hereto attached, and is in the words and figures following, to wit:

Citation.

76 UNITED STATES OF AMERICA, *ss:*

To Ida Martin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein John Good, impleaded with William N. Shepherd and Parker B. Cheney, is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgement in the said writ of error mentioned should not be corrected, & speedy justice should not be done to the parties in that behalf.

Witness the honorable Ebenezer T. Wells, justice of the said supreme court of the Territory of Colorado, this twenty-first day of October, in the year of our Lord one thousand eight hundred and seventy-three.

EBENEZER T. WELLS,
Associate Justice Sup. Ct. Colorado.

77 TERRITORY OF COLORADO,
County of Arapahoe, ss:

On this 8th day of November, A. D. 1873, E. L. Smith, being duly sworn according to law, deposes & says, that on the 6th day of November, A. D. 1873, he duly served the within citation by delivering to Samuel E. Browne, esq., of the firm of Browne & Putnam, and to N. Harrison, esq., attorneys of the said Ida Martin, defendant in error named in the within citation, a true and correct copy of the said citation, exhibiting and showing to them at the same time the within original citation; and further affiant saith not.

E. L. SMITH.

Sworn to & subscribed before me this 8th day of November, A. D. 1873.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Terrty.

(Indorsed:) 93. John Good v. Ida Martin. Citation. Filed Nov. 8, 1873. David W. Crater, clerk.

78 And afterwards, to wit, on the sixteenth day of December, A. D. 1873, there was filed in the office of the clerk of said supreme court of Colorado Territory a præcipe for record, which said præcipe is in the words and figures following, to wit:

Præcipe.

In the supreme court.

JOHN GOOD, IMPLEADED WITH WILLIAM N. Shepherd and Parker B. Cheney, appellant,
vs.
IDA MARTIN, APPELLEE.

UNITED STATES OF AMERICA,
Territory of Colorado:

To David W. Crater, Esq., Clerk:

Please prepare a complete record of the above-entitled cause for the Supreme Court of the United States at Washington, D. C., together with copy of opinion of the said supreme court of Colorado Territory on file herein, & all records in said cause in your office.

Respy. yours, &c.,

E. L. SMITH,
Atty. for John Good.

(Indorsed:) 93. John Good, impleaded &c., v. Ida Martin. Præcipe for record. Filed Dec. 16, 1873. David W. Crater, clerk.

79 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, John W. Webster, clerk of the supreme court of Colorado Territory, do hereby certify that I have compared the foregoing hereto attached

copy of the record and proceedings had in said supreme court in a cause lately therein pending, wherein John Good, impleaded with Parker B. Cheney and William N. Shepherd, was appellant, and Ida Martin was appellee, with the original record of said court in said cause and papers now remaining on file in my office, and that the same are true and perfect transcripts therefrom and the whole of their respective originals. And I do further certify that the writ of error hereto attached, together with the citation with service thereon, are the original writ of error and original citation with service thereon heretofore filed in my office in the above-entitled cause.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said supreme court at Denver in said county and Territory, this twenty-fourth day of January, A. D. 1874.

[SEAL.] JOHN W. WEBSTER,
Clerk Supreme Court Colorado Territory.

Fees for transcript: 224 folios, a 20c., $44.80; certificate & seal, 1.00—$45,80. Paid by John Good, appellant.

(Indorsement on cover:) No. 513. Colorado Terry. Sup. ct., John Good, plaintiff in error, vs. Ida Martin, filed 24 September, 1874.

Supreme Court of the United States.

No. 44.

JOHN GOOD, PLAINTIFF IN ERROR,

vs.

IDA MARTIN.

In Error to the Supreme Court of the Territory of Colorado.

BRIEF FOR PLAINTIFF IN ERROR.

R. T. MERRICK,
M. F. MORRIS,
Of Counsel for Plaintiff in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 44.

JOHN GOOD, PLAINTIFF IN ERROR,

vs.

IDA MARTIN.

In Error to the Supreme Court of the Territory of Colorado.

BRIEF FOR PLAINTIFF IN ERROR.

The proceedings in this case were instituted to enforce the alleged liability of one P. B. Cheney and one W. N. Shepherd, as makers of a promissory note, and of the plaintiff in error as a surety upon it. Cheney and Shepherd made default in the lower court, and Good alone contested his liability. Good's name appears on the back of the note, without any evidence from the paper itself as to the character in which he signed it. The controversy in the case is whether he is to be regarded as a surety or as an indorser.

Numerous exceptions were taken to the rulings of the district court, but only two were much pressed in the supreme court of the Territory, and these two are now submitted to the adjudication of this Court.

ASSIGNMENT OF ERRORS.

1. The court erred in charging the jury, among other things, as follows: "Upon the second question the jury are

instructed, that, if they find from the evidence that John Good wrote his name upon the back of the note sued on before the delivery of said note to the payee, and that he did not then make any statement of his intention in so doing, he is presumed to have done so as the surety of Cheney and Shepherd, and for their accommodation, and to give them credit with the payee, and is liable for the payment thereof in this action; and if that presumption is not rebutted by the evidence in the case, you must find for the plaintiff in the issue joined between her and John Good." (Record, p. 25.)

2. The court erred in refusing to allow John Good and William N. Shepherd to testify in the case. (Record, p. 23.)

BRIEF.

1. The rule of law is, that a party, whose name appears on the back of a negotiable instrument under circumstances like those connected with this note, is *prima facie* an indorser; that parol testimony is admissible to show in what character he signed, whether as surety, guarantor, or indorser; that no presumption of law arises to charge the party as surety; that the presumption rather is in favor of his being regarded as an indorser; and that it is incumbent on the party who would rebut that presumption, to show a different character. The instruction of the Court on this point was, therefore, wrong.

Rey *vs.* Simpson, 22 Howard, 341.
Story on Promissory Notes, sec. 133.

2. The exclusion of Good and Shepherd as witnesses because of their interest, was erroneous.

The act of Congress of February 28, 1861, (12 Stat., p. 176,) organizing the Territory of Colorado, provides that "all laws of the United States which are not locally inapplicable shall have the same force and effect within the said

Territory of Colorado as elsewhere within the United States." The act of July 3, 1864, (13 Stat., p. 351,) which provides that "in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried," is not locally inapplicable; and the territorial court, though not a constitutional, but a legislative court, is still "a court of the United States," entirely liable to be controlled in all things by the laws of Congress. There is no reason, therefore, why the act of 1864 should not have controlled the case in question.

Again, it does not appear very plainly why the territorial act of 1870 should not have applied. That act, though passed after issue joined in this case, but before the trial, rendered parties to suits competent witnesses. Now, it is well established law, that the legislative power may modify or change existing remedies without thereby impairing the rights of parties, and that questions of right are to be tried in accordance with the forms in force at the time of trial.

Calder *vs.* Ball, 3 Dallas, 386.

Baltimore, &c., R. R. Co. *vs.* Nesbit, 10 Howard, 395.

Had these witnesses been admitted their testimony would have fully explained the circumstances of Good's indorsement.

R. T. MERRICK,
M. F. MORRIS,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1877.

No. 11.

JOHN GOOD, PLAINTIFF IN ERROR,

vs.

IDA MARTIN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

BRIEF FOR DEFENDANT IN ERROR.

Although thirty-three errors were assigned by the astute counsel for Plaintiff in error to the rulings of the Court below, but two of that goodly number are submitted for the consideration of this Court, and it may, without any intentional discourtesy and in all kindness, be submitted, that those two might with equal force and propriety, and for good reasons, have shared the abandoned fate of the other thirty-one.

The cogent reasoning of the learned Chief Justice who delivered the opinion of the Supreme Court of Colorado in this cause, should be conclusive upon the two submitted points, and I refer to it with entire satisfaction, making it my argument for the consideration of this Court. Transcript of Record, pages 33, 34 and 35.

To which may be added, in reply to the first point of the learned counsel for Plaintiff in error, that the endorsement of the promissory note by John Good, the Plaintiff in error, was at the time of making and upon the delivery thereof, an original undertaking on his part to pay the same, or at least to guaranty the payment thereof.

His indorsement having been made at the date of the note and before delivery, for the palpable purpose of giving credit to the maker and enabling him to negotiate the

same to the payee thereof, renders him liable as original party to the note, the same as though he had signed it upon the inside of the instrument.

Sanford v. Norton, 17 Vermont, 285; Lafton v. Pomeroy, 11 Connecticut, 440; Baker v. Briggs, 8 Pick. 122; Story on Prom. Notes, sec. 476 and note.

In reply to the second point—

I. The Territorial Courts are *not* courts of the United States.

Clinton v. Englebrecht, 13 Wall., 434; Hornbuckle v. Toombs, 18 Wall., 648.

II. The Act of July 3d, 1864, (13 U. S. Stats. 351,) applies only to causes in the United States Courts, and has no force in either State, Territorial or local courts in contravention of local statutes. Good and Shepherd were properly excluded as witnesses.

Bowman v. Noyes, 12 New Hamp., 302; Bridges v. Armour, 5 How., 94; Bailey v. Knapp, 7 Harris, 192; Hatz v. Snyder, 2 Casey, 511.

III. The act of the Legislative Assembly of Colorado entitled "An act relating to the competency of witnesses in civil cases," approved Feb. 11, 1870; vide Gen. Laws of Colorado of 1870, pages 62, 3, 4 and 5, contains the following proviso in the last section of the act: "*Provided, That it* (this act) *shall not apply to cases pending at the passage thereof in the district courts*, on appeal from justices of the peace, *nor to cases at issue at the passage hereof in the District* and Probate *courts*.

This cause was at issue in the District Court Feb. 8, 1869, vide transcript of record, page 7; consequently, it was excluded from the provisions of that act.

Although the writ of error was sued out Oct. 21, 1873, the brief of the plaintiff in error was not filed until Oct. 9, 1877.

H. C. ALLEMAN,
of Counsel for Defendant in Error.